84-1047

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ALEXANDER L. STEVAS,
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

No.

LOUIE L. WAINWRIGHT, Secretary
Department of Corrections
State of Florida

Petitioner,

vs.

DENNIS WAYNE SMITH,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF PETITIONER ON JURISDICTION

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1. Whether counsel's representation fell below the performance standard required by this Court in Strickland v. Wainwright, __ U.S. __, 80 L.Ed.2d 674 (1984), where counsel's cross-examination, although adequate, did not include all sources of impeachment evidence.

2. Assuming counsel's performance was deficient, does prejudice result from the faiure to use a pretrial statement for purposes of impeachment where the record as a whole demonstrates that counsel effectively attacked the witnesses' credibility using other sources of impeachment evidence.

3. Whether the Court of Appeals failed to properly apply, pursuant to 28 U.S.C. §2254(d), the factual findings made by the state trial court after a full and fair hearing regarding an alleged violation of Brady v. Maryland, 373 U.S. 83 (1963).

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit appears in the appendix hereto as "A 1 - 74." The published opinion is reported as Smith v. Wainwright, 741 F.2d 1248 (11th Cir. 1984). The order of the District Court, Middle District of Florida, Tampa, Division, appears in the appendix as "A 75 - 178."

JURISDICTION

On November 18, 1983, the federal District Court denied Smith's application for a writ of habeas corpus filed pursuant to Title 28 U.S.C. §2254. On August 24, 1984, the Court of Appeals reversed the lower court's order and on September 10, 1984, the State filed a Suggestion for Rehearing En Banc. The State's application for Rehearing En Banc was denied on

October 31, 1984 and this Petition for Certiorari was filed within sixty (60) days of this date. The jurisdiction of this Court is invoked pursuant to the specific provisions of Rule 17 of the Rules of the Supreme Court, Title 28 U.S.C. 1254(1),

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment VI of the Constitution of the United States provides that:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Title 28 U.S.C. §2254(a) provides that:

> "The Supreme Court, a justice thereof, a circuit judge or a District Court shall entertain an application for a Writ of Habeas Corpus in behalf of a person in custody pursuant to the judgment of a State Court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

28 U.S.C. §2254(d) provides in pertinent part:

> (d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit--
>
> (1) that the merits of the

factual dispute were not resolved in the state court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdictiin of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue

> was made, pertinent to a determination of the sufficientcy of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record.

STATEMENT OF THE CASE

The factual background of this case, as is relevant to this proceeding, was summarized by the Florida Supreme Court as follows:

> After taking part in the murder of John Mitchell Arnsdorff, Wesley Johnson turned himself into police. Eventually he was charged with two other murders, as well. In the meantime he implicated Smith in the Arnsdorff murder and, accordingly, Smith was indicted for first degree murder. Smith pleaded not guilty and the cause was set for trial. Before its start, Johnson pleaded nolo contendere to the three murders and was to be given concurrent life sentences in return for testimony against Smith, the sentences to be imposed after the testimony.

Johnson testified to the following: He, Smith and a man named Wagner met at a bar and decided to rob a homosexual in order to obtain money for beer. The three men went to another bar where they met Arnsdorff. On the pretext of giving a party, they invited him to a shack Johnson was staying in. Arnsdorff and Johnson drove in Arnsdorff's car, Smith and Wagner in Smith's car. Johnson and Arnsdorff reached the shack first. Smith and Wagner had taken a wrong turn and were late, but Johnson kept Arnsdorff from leaving by showing him some silver casting equipment. When the former two arrived the men drank beer for a short while and then Johnson grabbed Arnsdorff while Wagner threatened him with an ice pick. While Arnsdorff was restrained Smith took Arnsdorff's wallet, in which there was $6.00, from his car and one of the three removed his wrist watch. They then forced Arnsdorff into the trunk of his own car. Their intention was to abandon him in a remote spot. Wagner and Johnson, in Arnsdorff's car, were following Smith in his car when they ran into a bridge abutment, flattening a tire. (Throughout the night the three had been drinking heavily.) After an

unsuccessful attempt to fix it, the two cars proceeded until the wheel with the flat tire came loose. On of the three opened the trunk and Smith hit Arnsdorff with a tire tool. Wagner then began to stab him with the ice pick. Believing Arnsdorff to be dead they shut the trunk with him in it and went to a gas station. Smith told Wagner to get some gas, which he did. They returned to Arnsdorff's car and at Smith's direction, Johnson doused it with gas and set it afire. (Expert opinion that Arnsdorff died from incineration or asphyxiation from smoke caused by the fire had been introduced into evidence earlier.)

At this point in Johnson's narration the court excused the jury to allow the defense to renew a pre-trial motion that testimony by Johnson as to a second murder by him and Smith be suppressed. The court denied the motion, as it had previously done, on the ground that the second murder, though separate from the first, was part, just as Arnsdorff's, of a single transaction, the robbery, an, therefore, relevant to the Arnsdorff murder.

Johnson then testified that after burning the car he, Smith and Wagner immediately went to a

> swimming hole. An argument over division of the $6.00 and watch ensued between Smith and Wagner. Smith yelled to Johnson to grab Wagner, and while Johnson held him Smith stabbed him with the ice pick. At Smith's direction Johnson pulled Wagner into the swimming hole and held him under water to ensure his death. They transported his body elsewhere and buried it.
>
> Smith took the stand in his own defense. He admitted that he was in the company of Wagner and Johnson on the night of the murder, but claimed that the robbery was their idea. Although he accompanied them to the second bar and left it with them and the victim, he testified that they drove him straight from the bar to his apartment, because he was too intoxicated by beer and drugs to do anything but sleep. That was the last, according to Smith, he saw of them that night. No evidence was introduced by the defense to corroborate the alibi.

365 So.2d 705 - 706 (Fla. 1978). Smith was tried and convicted on one count of first degree murder. Following a sentencing hearing, the trial judge accepted the

jury's recommendation and sentenced the defendant to death. Smith appealed to the Florida Surpeme Court, which affirmed his conviction in Smith v. State, 365 So.2d 704 (Fla. 1978), cert. denied, 444 U.S. 885 (1979). In 1981, Smith filed in the state trial court a motion for post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.850. The court concluded that the majority of Smith's claims were not appropriate in a post-conviction proceeding and denied the motion without an evidentiary hearing. The Florida Supreme Court affirmed the trial court's order in part but remanded for an evidentiary hearing concerning an alleged violation of Brady v. Maryland, 373 U.S. 83 (1963). See Smith v. State, 400 So.2d 956 (Fla. 1981). Following an evidentiary

hearing, the trial court again denied Smith's motion for post-conviction relief, and the Florida Supreme Court affirmed in Smith v. State, 421 So2d 146 (Fla. 1982).

On February 9, 1983, Smith filed in a federal district court a petition for writ of habeas corpus pursuant to 28 U.S.C. §2254. The district court denied relief in a Memorandum Opinion dated November 18, 1983. On August 23, 1984, the Court of Appeals reversed, holding that Smith was entitled to an evidentiary hearing on his claim that counsel was ineffective because he failed to impeach prosecution witnesses, Wesley and Patricia Johnson, using conflicting pretrial statements made September 6, 1975. The State filed a timely motion for Rehearing En Banc and a Motion for Stay of Mandate. Both motions were denied on October 31, 1984.

The State of Florida files a petition for Writ of Certiorari seeking review of the decision of the Court of Appeals. An application for Stay was denied by Justice Powell on November 9, 1984. See Wainwright v. Smith, Case No. A-361.

REASONS FOR GRANTING THE WRIT

I.

Whether counsel's representation fell below the performance standard required by this Court in Strickland v. Wainwright, __ U.S. __, 80 L.Ed.2d 674 (1984), where counsel's cross-examination, although adequate, did not include all sources of impeachment evidence.

The Court of Appeals remanded to the district court for a hearing on respondent's claim that trial counsel was ineffective because he failed to impeach prosecution witnesses, Wesley and Patricia Johnson, using pretrial statements of September 6, 1975 which contained no reference to Smith. At respondent's trial, defense counsel impeached Wesley Johnson using his plea agreement with the State[1]

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[1] Johnson's plea bargain with the State allowed him to escape the death penalty in exchange for his testimony against Smith, with actual imposition of sentence to be withheld until after he had testified.

and a "jailhouse note" written by Johnson and sent to Smith.[2] During the State's rebuttal case, the prosecutor called Patricia Johnson, Wesley Johnson's wife, who gave testimony concerning prior consistent statements made by Johnson. Defense counsel impeached Patricia Johnson using her criminal record which consisted of a prior conviction for forgery.

The threshold question in any claim alleging ineffective assistance of counsel is whether counsel's errors or omissions deprived the defendant of a fair trial. Strickland v. Washington, __ U.S. __, 80 L.Ed.2d 674 (1984). This concept is

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[2] While in jail awaiting trial, Johnson wrote a note to Smith which states that "I made sure he heard me talking about how I done it by myself . . . " This note indicates that Johnson confessed to another inmate named Parks so that Smith could call Parks at trial to impeach Johnson.

manifest throughout the Strickland opinion. First, the court points out that

> In giving meaning to the requirement [of counsel] we must take its purpose---to ensure a fair trial--as the guide. The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

80 L.Ed.2d at 692 - 693. Later, in explaining the prejudice requirement the Court at page 696 states:

> The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance.

Thus, the overriding consideration in any claim alleging ineffective assistance of counsel is whether counsel's errors or

omissions deprived the defendant of a fair trial.

In Strickland, this Court outlined the standard for judging claims alleging ineffective assistance of counsel. The court established a two-prong test which examines attorney performance and prejudice to the defense. With regard to counsel's performance the Court said:

> First, the defendant must show that counsel's performance was deficient. That requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment.
>
> 80 L.Ed.2d at 693

In defining "the counsel" guaranteed by the Sixth Amendment the Court explained that the Constitution "envisions counsel playing a role that is critical to the ability of the adversarial system to produce just results." Id. at 692. "Counsel

has a duty" says the Court "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Id. at 694. Counsel breeches that duty when he acts in a fashion which is less than adequate to ensure a fair trial.

In respondent's case, defense counsel's impeachment of Wesley and Patricia Johnson was adequate to ensure a fair trial. This is not a case where counsel made no effort to challenge the witnesses' credibility through impeachment, rather this is a case where counsel chose to rely upon most but not all impeachment evidence at his disposal. How much or what type of impeachment evidence counsel chooses to rely on is simply a matter of professional judgment. See Michel v. Louisana, 350 U.S. 91, 101 (1955).

This Court in Strickland recognized a "presumption of effectiveness." The court said:

> Because of the difficulities inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." See Michel v. Louisiana, supra at 101, 100 L.Ed. 83, 76 S.Ct. 158.
>
> 80 L.Ed.2d at 695

It was defense counsel's manifest strategy during trial to attack Johnson's credibility primarily on the basis of his plea agreement with the State under which he escaped the death penalty himself in exchange for his plea and testimony against Smith, with actual imposition of sentence to be withheld until after he had testified. Counsel made that point during

his cross-examination, together with the fact that Johnson had taken sole responsibility for the crime on another occasion. Other lawyers might have proceeded differently; and, because it has since become known the jury elected to credit Johnson's testimony anyway, it is easy to suggest through hindsight that perhaps this additional impeachment evidence might have been persuasive and that counsel should have proceeded differently. That is not enough, however, to warrant a finding of ineffective assistance of counsel. See Strickland v. Washington, supra at 694.

The Court of Appeals incorrectly assumes that counsel, to be effective, must make use of all impeachment evidence at his disposal. This "if you can do, you must do philosophy" is directly contrary to this Court's view in Strickland that

counsel must be afforded wide latitude in making tactical decisions. 80 L.Ed.2d at 694. Moreover, the effect of the assumption, that counsel must make use of all available impeachment evidence, establishes a "checklist" for judicial evaluation of effective cross-examination. In Strickland, this Court warned against creating a "checklist for judicial determination of attorney performance." Id.

Defense counsel's cross-examination, was not so inadequate as to undermine the reliability of the results of the proceedings. Respondent has failed to overcome the "presumption of effectiveness" and is not entitled to an evidentiary hearing on this claim.

II.

Assuming counsel's performance was deficient, does prejudice result from the failure to use pretrial statements for purposes of impeachment where the record as a whole demonstrates that counsel effectively attacked the witnesses' credibility using other sources of impeachment evidence.

Any deficiencies in counsel's performance, even if professionally unreasonable, must be prejudicial to the defense in order to constitute ineffective assistance. Washington v. Strickland, supra at 696. In assessing the degree of prejudice necessary to warrant reversal, this Court distinguished between errors which effect the outcome of the proceeding and errors which undermine the reliability of the result of the proceeding. Rejecting the first standard, the "conceivable benefit

test," as to lenient this Court adopted the reliability standard and fashioned a test which focuses on fundamental fairness. The Court said:

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.
>
> 80 L.Ed.2d at 698.

"A probability sufficient to undermine confidence in the outcome" is an error or omission by counsel which renders the results of the proceeding unreliable. The dispositive question, as stated by this Court in Strickland, is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." 80

L.Ed.2d at 692 - 693.

In respondent's case, the Court of Appeals decided that the omitted impeachment evidence "could well have affected the outcome of the trial", and therefore, "may well have resulted in prejudice under the test in Strickland." Smith v. Wainwright, 741 F.2d 1248, 1254, 1255 (11th Cir. 1984). The court's rationale appears to apply the same kind of "conceivable benefit test" rejected by this Court in Strickland,

> It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel could meet that test . . . not every error that conceivabley could have influenced the outcome undermines the reliability of the result of the proceeding. (Citation omitted).
>
> 80 L.Ed.2d at 697.

Although the use of additional impeachment evidence might have been beneficial to the defense in this case, failure to use the statements did not result in a breakdown of the adversarial process which renders the results of the proceeding unreliable.

In making the determination whether the specified error or omission resulted in the required prejudice, a court "must consider the totality of the evidence before the judge or jury." Strickland v. Washington, supra at 698. In respondent's case, defense counsel cross-examined Wesley Johnson regarding his plea agreement with the State which allowed him to escape the death penalty in exchange for his testimony. Defense counsel also impeached Johnson using a note he (Johnson) wrote to Smith which states that "I made sure he

heard me talking about how I done it by myself . . . " This note indicates that Johnson confessed to another inmate named Parks so that Smith could call Parks at trial to impeach Johnson. Johnson's plea bargain and other motivations for testifying against petitioner were fully explored during his cross-examination and were available for the jury's consideration in assessing his credibility as a witness. (A 180 - 220) As for Patricia Johnson, defense counsel used the witness' criminal record as a basis for impeachment. Considering the "totality of the impeachment evidence" presented to the jury, counsel's failure to use the pretrial statements of September 6th did not render the results of the trial unreliable.

In the circumstances of this case,

where counsel challenged the credibility of Patricia and Wesley Johnson through competent impeachment evidence, failure to use the prior inconsistent statements of September 6th as further impeachment did not render the results of the proceeding unreliable.

III.

Whether the Court of Appeals failed to properly apply, pursuant to 28 U.S.C. §2254(d), the factual findings made by the state trial court after a full and fair hearing regarding an alleged violation of Brady v. Maryland, 373 U.S. 83 (1963).

The Eleventh Circuit Court of Appeals remanded this case to the district court for a hearing on respondent's claim that trial counsel was ineffective because he failed to impeach prosecution witnesses Wesley and Patricia Johnson using their pretrial statements of September 6, 1975. In reviewing this claim the Court of

Appeals decided that the district court would necessarily have to pass on another question--whether these pretrial statements were made available to the defense as required by Brady v. Maryland, 373 U.S. 83 (1963). See, Smith v. Wainwright, 741 F.2d 1248, 1256 (11th Cir. 1984).[3] The identical Brady claim was fully and fairly litigated in the state courts. See, Smith v. State, 400 So.2d 956, 962 - 964 (Fla.

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[3] In its treatment of the Brady claim, the Court of Appeals said:

> If the district court should conclude after an evidentiary hearing that the statements were not available to trial counsel . . . the district court should conclude that under 28 U.S.C. §2254(d)(3), the material facts were not adequately developed at the state court hearing. See Thomas v. Zant, 697 F.2d 977, 980 (11th Cir. 1983), and issue the writ under Brady v. Maryland. (footnote omitted)

Smith v. Wainwright, 741 F.2d at 1256

1981), appeal following remand, 421 So.2d 146 (Fla. 1982). The Court of Appeals failed to accord these findings a presumption of correctness as required by 28 U.S.C. §2254(d) and Sumner v. Mata, 449 US. 539 (1981).

The standard applicable to evidentiary hearings involving "material facts not adequately developed at the state court proceedings" are governed by Townsend v. Sain, 372 U.S. 293, 313 (1963) and section (d)(3) of the federal habeas corpus statute, 28 U.S.C. §2254. To obtain an evidentiary hearing based on such a claim the petitioner must make a showing of two elements. First, the petitioner must show that a fact pertaining to his federal constitutional claim was not adequately developed at the state court hearing and that this fact was crucial to a

fair development of the material facts. Second, petitioner must show that failure to develop the material fact in the state proceeding was not attributable to his own inexcusable neglect or deliberate bypass. Id. at 317. A demonstration of both these elements entitles a petitioner to an evidentairy hearing on the substance of his federal claim.

The record in this case shows that Smith has failed to make a showing on the first part of the Townsend test, a fact pertaining to his constitutional claim was not adequately developed at the state court level. Unlike Thomas v. Zant, 697 F.2d 977 (11th Cir. 1983), cited by the Court of Appeals, Smith did not come into federal court with a crucial piece of evidence not presented earlier at any hearing. See also, Young v. Zant, 727 F.2d

1489, 1492 (11th Cir. 1984) (defendant presented no new evidence to federal court which would entitle him to an evidentiary hearing.) The petitioner in Thomas produced an affidavit from his trial attorney which came very close to admitting that the attorney had no strategy at all for the penalty phase of Thomas' capital trial. The court found the affidavit sufficient to meet the first prong of the Townsend test, requiring that the evidence sought to be presented in the federal evidentiary hearing must be material to the disputed issue involved. Thomas v. Zant, supra at 988. Unlike Thomas, the respondent in this case presented no new evidence to the district court which would entitle him to a hearing on the Brady claim.

The record is also clear that failure to develop the material facts was due to petitioner's own inexcusable neglect or deliberate bypass. Townsend v. Sain, supra at 317. Respondent's attorney was not present at the state hearing on the claimed Brady violation, having moved out of the state. But the record of the hearing shows that Smith's new lawyers had previously conferred with trial counsel by telephone. No continuance was sought in order to obtain the trial attorney as a witness, nor does Smith explain why he could not have deposed the attorney, even if he was unable to subpoena him. Cf., Birt v. Montgomery, 725 F.2d 587, 590 n. 5 (11th Cir. 1984) (en banc) (noting possibility that petitioner could depose witness without passing on sufficiency of state hearing). Smith's failure to

develop the material facts in the state proceeding was attributable to his own inexcusable neglect or deliberate by-pass.[4]

Whether the pretrial statements of September 6th were made available to the defense as required by Brady was fully and fairly litigated in the state courts and should be accorded a presumption of correctness pursuant to §2254(d) and Sumner v. Mata, supra. Respondent failed to meet

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[4] In Henry v. Mississippi, 379 U.S. 443, 451 (1965), this Court put to rest the suggestion in Fay v. Noia, 372 U.S. 391 (1963) and Johnson v. Zerbst, 304 U.S. 458 (1938) that only the defendant himself could make an effective waiver of constitutional rights. The Court held that counsel's decisions on trial strategy could amount to a waiver binding on the defendant which would preclude him from a decision on the merits of his federal claim.

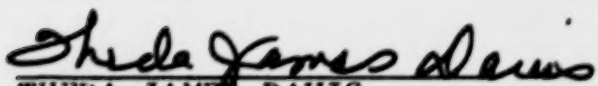
the first prong of the Townsend test which requires a showing that a material fact pertaining to his federal constitutional claim was not adequately developed at the state court proceedings.

CONCLUSION

For these reasons, petitioner respectfully urges this Court to grant Certiorari and to summarily reverse the decision of the Court of Appeals in and for the Eleventh Circuit.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



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October Term, 1984

Louie L. Wainwright, Secretary
Department of Corrections
State of Florida

Petitioner,

vs.

Dennis Wayne Smith,

Respondent.

On Petition for Writ of Certiorari
to the United States
Court of Appeals for the
Eleventh Circuit

APPENDIX OF PETITIONER ON JURISDICTION

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Dennis Wayne SMITH,
Petitioner-Appellant,

v.

Louie L. WAINWRIGHT, Secretary of Florida Department of Offender Rehabilitation, et al., Respondents-Appellees.

No. 83-3690

United States Court of Appeals,

Eleventh Circuit.

August 23, 1984

Habeas petitioner appealed from an order of the United States District Court for the Middle District of Florida, Wm. Terrell Hodges, Chief Judge, denying his petition for writ of habeas corpus. The Court of Appeals, James C. Hill, Circuit Judge, held that: (1) habeas petitioner was entitled to evidentiary hearing on claim of ineffective assistance of counsel for failure to use prior conflicting statements to impeach prosecution

witneses; (2) posttrial recantations of accomplice did not warrant habeas relief; (3) claim that accomplice confessed and agreed to testify for the state only because of fear of death penalty was barred by procedural default; (4) admission of testimony concerning facts of second murder for which petitioner was not on trial did not deprive petitioner of fundamental fairness so as to warrant habeas relief; (5) alleged error in admitting testimony of accomplice's wife did not render trial fundamentally unfair so as to warrant habeas relief; (6) fact that psychiatrist retained by petitioner did not read petitioner Miranda warnings before conducting examination did not render testimony based on petitioner's statements inadmissible; (7) alleged disparity in sentencing between petitioner

and acomplice did not warrant habeas relief; and (8) appellate counsel rendered constitutonally effective assistance.

Affirmed in part, and remanded.

1. Habeas Corpus 59

Habeas petitioner was entitled to evidentiary hearing on claim of ineffective assistance of counsel for failure to use conflicting statements to impeach prosecution witnesses.

2. Criminal Law 641.13(1)

To demonstrate ineffective assistance of counsel, a defendant must show both that attorney failed to render reasonably effective assistance and that there is a reasonable probability that, but for counsel's unprofessional errors, result of proceeding would have been different.

3. Habeas Corpus 25.1(8)

Posttrial recantations of prosecution

witness did not warrant habeas corpus relief since such evidence, absent showing that it bore directly on constitutionality of conviction, went to merits of conviction, not its legality.

4. Habeas Corpus 25.1(8)

Habeas petitioner's failure to properly raise under Florida procedure issue that accomplice confessed and agreed to testify for state only because of accomplice's fear of death penalty, in absence of showing of cause for failure to preserve issue and resulting prejudice, barred issue from review in federal courts on petition for habeas corpus.

5. Habeas Corpus 45.2(4)

In order for an evidentiary ruling to be cognizable in habeas corpus, it must deprive state court defendant of fundamental fairness.

6. A denial of fundamental fairness to a state court defendant sufficient to render evidentiary ruling cognizable in habeas corpus occurs when evidence is material in sense of a crucial, critical, highly significant factor.

7. Habeas Corpus 45.2(4)

Although admissiblity of testimony concerning second murder for which habeas petitioner had not been on trial presented a close and difficult question under Florida law, admission of such testimony did not result in a denial of fundamental fairness sufficient to render Florida court's evidentiary ruling cognizable in habeas corpus.

8. Habeas Corpus 45.2(4)

Omission of accomplice's wife from witness list and presence of accomplice's wife during portion of trial that preceded

her testimony in violation of sequestration rule, if violation of Florida state law, did not render trial fundamentally unfair so as to warrant federal habeas relief.

9. Criminal Law 412.1(2)

Testimony of psychiatrist retained by defendant through his trial counsel to conduct examination regarding possible claim of insanity was not rendred inadmissible because psychiatrist did not read defendant Miranda warnings before conducting psychiatric examination.

10. Habeas Corpus 45.2(4)

Alleged disparity in sentencing of defendant, who received death penalty for his part in murder, and accomplice, who received sentence of 25 years in prison in accordance with plea bargain, did not violate Federal Constitution so ac to warrant

habeas relief.

11. Criminal Law 641.13(7)

Appellate counsel rendered constitutionally effective asistnce to defendant who had been sentenced to death for his part in murder, despite contentions that counsel should have challenged on appeal admissiblity of photographs of victim's body during penalty phase of trial, counsel should have argued that Florida procedure providing for bifurcated sentencing hearing was unconstitutional, counsel should have challenged at penalty phase admissiblity of testimony of psychiatrist retained by defendant, appellate counsel wrongly failed to challenge trial court's finding of heinous, atrocious, or cruel aggravating circumstances, appellate counsel should have challenged jury instructions, and appellate counsel should have

requested transcription of entire voir dire proceedings.

12. Habeas Corpus 59

District court properly refused to grant evidentiary hearing on habeas petitioner's contention that death penalty in Florida had been discriminatorily applied on basis of race of victim in view of fact that such issue had been conclusively resolved adversely to petitioner.

13. Habeas Corpus 59

District court properly refused to grant evidentiary hearing to habeas petitioner on challenged use of nonrecord material by Florida Supreme Court in reviewing his death penalty case in view of fact that such issue had been conclusively resolved adversely to petitioner.

14. Habeas Corpus 30(1)

Habeas petitioner's claim that

sentence of death was unconstitutional because of state trial judge's faulty instructions to jury concerning aggravating and mitigating circumstances and because trial judge misapplied law concerning use of circumstances by relying on unconstitutional circumstance was barred by procedural default.

Appeal from the United States District Court for the Middle District of Florida.

Before RONEY and HILL, Circuit Judges, and TUTTLE, Senior Circuit Judge.

JAMES C. HILL, Circuit Judge:

Dennis Wayne Smith appeals to this court from the order of the distict court denying his petition for a writ of habeas corpus. We affirm the district court's judgment in part; however, concluding that

Smith should have received a hearing on some of his claims of constitutional error we vacate in part and remand.

Smith was tried and convicted in a Florida court on one count of first degree murder in late March, 1976. After a sentencing hearing, the trial judge sentenced Smith to death. Smith appealed to the Florida Supreme Court, which affirmed his conviction in Smith v. State, 365 So.2d 704 (Fa. 1978), cert. denied, 444 US. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (1979). In 1981, Smith filed a motion to vacate his conviction and sentence pursuant to Florida Rule of Criminal Procedure 3.850. The trial court denied this motion without a hearing, and Smith appealed. The Florida Supreme Court affirmed the trial court's order in part, but remanded for an evidentiary hearing

concerning an alleged violation of the rule in Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). See Smith v. State, 400 So.2d 956 (Fla. 1982). After holding a hearing, the trial court again denied Smith's motion, and the Florida Supreme Court affirmed in Smith v. State, 421 So.2d 146 (Fla. 1982). On February 9, 1983, Smith filed his petition for a writ of habeas corpus in the district court pursuant to 28 U.S.C. §2254.

The factual background of this case is relevant to several of the issues raised by Smith. The primary evidence at trial against Smith was the testimony of Wesley Johnson, which the Florida Supreme Court summarized as follows:

> After taking part in the murder of John Mitchell Arnsdorff, Wesley Johnson turned himself into the police.

Eventually he was charged with two other murders, as well. In the meantime he implicated Smith in the Arnsdorff murder and accordingly, Smith was indicted for first degree murder. Smith pleaded not guilty and the cause was set for trial. Before its start, Johnson pleaded nolo condendere to the three murders and was to be given concurrent life sentences in return for testimony against Smith, the sentences to be imposed after the testimony.

Johnson testified to the following: He, Smith and a man named Wagner met at a bar and decided to rob a homosexual in order to obtain money for beer. The three then went to another bar where they met Arnsdorff. On the pretext of giving a party, they invited him to a shack Johnson was staying in. Arnsdorff and Johnson drove in Arnsdorff's car, Smith and Wagner in Smith's car. Johnson and Arnsdorff reached the shack first. Smith and Wagner had taken a wrong turn and were late, but Johnson kept Arnsdorff from leaving by showing him some silver casting equipment. When the former two arrived the men drank beer for a short while and then Johnson grabbed Arnsdorff while Wagner threatened him with an ice pick. While Arnsdorff was restrained Smith took

Arnsdorff's wallet, in which there was $600 from his car and one of the three removed his wrist watch. They then forced Arnsdorff into the trunk of his own car. Their intention was to abandon him in a remote spot. Wagner and Johnson, in Arnsdorff's car, were following Smith in his car when they ran into a bridge abutment, flattening a tire. (Throughout the night the three had been drinking heavily.) After an unsuccessful attempt to fix it, the two cars proceeded until the wheel with the flat tire came loose. One of the three opened the trunk and Smith hit Arnsdorff with a tire tool. Wagner then began to stab him with the ice pick. Believing Arnsdorff to be dead they shut the trunk with him in it and went to a gas station. Smith told Wagner to get some gas, which he did. They returned to Arnsdorff's car and at Smith's direction, Johnson doused it with gas and set it afire. (Expert opinion that Arnsdorff died from incineration or asphyxiation from smoke caused by the fire had been introduced into evidence earlier.)

At this point in Johnson's narration the court excused the jury to allow the defense to renew a pre-trial motion that testimony by Johnson as to a second

murder by him and Smith be suppressed. The court denied the motion, as it had previously done, on the ground that the second murder, though separate from the first, was part, just as Arnsdorff's of a single transaction, the robbery, and therefore, relevant to the Arnsdorff murder.

Johnson then testified that after burning the car he, Smith and Wagner immediately went to a swimming hole. An argument over division of the $6.00 and watch ensued between Smith and Wagner. Smith yelled to Johnson to grab Wagner, and while Johnson held him Smith stabbed him with the ice pick. At Smith's direction Johnson pulled Wagner into the swimming hole and held him under water to ensure his death. They transported his body elsewhere and buried it.

Smith took the stand in his own defense He admitted that he was in the company of Wagner and Johnson on the night of the murder, but claimed that the robbery was their idea. Although he accompanied them to the second bar and left it with them and the victim, he testified that they drove him straight from the bar to his apartment, because he was too intoxicated by beer and drugs to do anything but sleep. That was the last, according to Smith, he saw of them that

> night. No evidence was introduced by the defense to corroborate the alibi.

365 So.2d at 705 - 06 (footnoted omitted). We will develop other facts as they become relevant to our opinion.

I. NEED FOR AN EVIDENTIARY HEARING

[1] Smith contends that the district court erred in refusing to grant him an evidentiary hearing concerning three of his claims for relief -- that his counsel rendered ineffective assistance, that the state Rule 3.850 hearing concerning the alleged Brady violation was not full and fair, and that his execution in light of recantations by Wesley Johnson would violate due process.[1] Although the legal analysis of Smith's right to a hearing

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[1] Smith also asked for an evidentiary hearing on other issues. We will address those claims separately.

differs greatly for each claim, we discuss them together because each claim has a common factual basis -- the numerous statements of Wesley Johnson. We conclude that, under Thomas v. Zant, 697 F.2d 977 (11th Cir. 1983), the district court should have granted Smith an evidentiary hearing on his claim of ineffective assistance of counsel. Given the interrelationship of this issue with the Brady issue, the hearing that must be held will necessarily concern both issues. The district court did not err in refusing a hearing concerning Johnson's recantations.

As the quoted excerpt from the opinion of the Florida Supreme Court indicates, Wesley Johnson was the primary

witness against Smith. The record[2] shows that in early September, 1975, Johnson presented himself to the Polk County Sheriff's Department and confesed to three murders. He claimed to have killed Caleb McDowell, John Mitchell Arnsdorff (whom Smith is convicted of murdering), and James Wagner. The transcript of Johnson's statement and the report of the Polk County Sheriff's Office, dated September 6, 1975, indicate that Johnson told the following story concerning the second and third victims.

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[2] Our record is somewhat unclear concerning some events. For example, it is doubtful that we now have before us all the statements of Wesley Johnson and Patricia Johnson, his wife. See Smith v. State, 400 So.2d 956, 953 n. 1 (Fla. 1981) (listing statements). Although we beleive our construction of the events to be substantially accurate, on remand the district court may expand the record and correct any misconceptions in our opinion.

Johnson met Wagner in a bar in Lakeland, Florida. Johnson and Wagner went to another bar, the Green Parrot, where they met Arnsdorff. The three journeyed first to Johnson's apartment and then to Arnsdorff's where Johnson and Wagner robed Arnsdorff of eleven dollars, tied him hand and foot, and put him into the trunk of his car. Johnson and Wagner promised Arnsdorff that they would drive him into the woods and leave him so that, "if he [had] enough energy," he could kick out the back seat of the car.

Johnson and Wagner drove away, but, after leaving Lakeland, they wrecked and the car became stuck in a ditch. Johnson stated that he then opened the trunk and hit Arnsdorff with a jack handle as Arnsdorff begged for mercy. Johnson stated that he stabbed Arnsdorff with the sharp

end of the jack and with a knife, while forcing Wagner to watch. Jonson and Wagner then climbed into a second car and drove away. Johnson refuesed to explain why a second car was with them, although the police asked him to do so. The two drove to a gas station and bought some gas. They then returned to the wrecked vehicle, doused it with gasoline, and set it afire with Arnsdorff in the trunk. This was the extent of what Johnson related concerning Arnsdorff's murder; he did not mention Smith.[3]

On September 8, an officer interviewed Wesley Johnson's wife, Patricia

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[3] The September 6 statement is relevant to this case for one reason in addition to Johnson's omission of Smith. In describing his murder of McDowell, which occurred two years before the other murders, Johnson indicated that he also locked the victim in the trunk of a car and set the car on fire after dousing it with gasoline.

Johnson. In this interview, she stated that Wesley had told her that both he and Smith had murdered Arnsdorff. Although Smith submitted this statmeent to us after argument, it is not in our record. Our record indicates that Patricia Johnson had, however, made a previous statement that omitted any reference to Smith.

On September 10, Patricia Johnson notified the officers that Wesley "wanted to tell the whole story about the three murders." Polk County Sheriff's Report at 6. She asked to meet Wesley. After talking with his wife, Johnson informed the police that he would prefer not to give a statement until his attorney could discuss a plea bargain. He indicated, however, that Smith had been with him on the night Arnsdorff was murdered and "did take part in the same." Id. Sometime subsequent to

this, Johnson apparently came to the agreement he desired[4] with the prosecutor and gave a statement implicating Smith. He stated that Smith had actually struck Arnsdorff with the tire jack. Johnson stated that Wagner stabbed Arnsdorff with an ice pick while Smith used the jack handle. Johnson then stated that he could not remember "exactly what happened right at the moment . . . we all looked around [and] I stepped up and slammed the [trunk]." Johnson also testified that, after returning with the gas, "[we] got out of the car and Slick's [Smith] got the gas can. So I poured the gas all over it. And Slick gets back in the car, and what's his name throwed a match on it."

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[4] Johnson testified at Smith's trial that he agreed to plead no contest to the three murders and testify against Smith in exchange for concurrent life sentences. Johnson was sentenced after Smith's trial.

In response to a clarifying question, Johnson indicated Wagner to be the person referred to as "what's-his-name." He also indicated in detail how he (Johnson) doused the car with gasoline.

As far as we can determine, Johnson made one other pretrial statement relevant to our decision. The trial transcript shows that Johnson sent a note to Smith while both were incarcerated before trial. The note read as follows:

> Hey, Slick, how are you doing? Okay? Well, the next time they say court, it's for real. Just keep cool. You can have Parks called because I made sure he heard me talking about how I done it by myself and it's like that. Just heard on the news that they, they are going to bring back the chair. Hope I miss it. Well, just stay cool. Jake.

Apparently, this note indicates that Johnson confessed to another inmate named Parks so that Smith could call Parks at

trial to impeach Johnson.

At trial, Johnson testified that Smith murdered Arnsdorff. Smith's counsel impeached Johnson with only the note written concerning Parks. The state then called Patricia Johnson in rebuttal to testify that Wesley had made prior statements consistent with his story implicating Smith. Since the trial, Johnson has made numerous sworn recantations of his trial testimony, stating that he lied at trial when implicating Smith and that he committed the crime himself.

A. Effective Assistance Claim

In his brief, Smith argues that his trial counsel was ineffective. He lists the following "errors and omissions" at the guilt/innocence phase of the trial:

> 1. Failure to seek a Richardson hearing and challenge the admissibility of the testimony of Patricia Jonson under the

rule of sequestration;

2. Failure to use Paricia or Wesley Johnson's pretrial statements for impeachment;

3. Failure to interview Smith adequately; and

4. Failure to depose Wesley Johnson before trial.

Smith also contends that his attorney, during the penalty phase:

1. Failed to adduce appropriate mitiagating evidence or properly use that evidence in closing argument;

2. Failed to seek jury instructions on reasonable doubt or object to other instructions;

3. Failed to understand the bifurcated proceeding; and

4. Failed to challenge the use of the heinous, atrocious, and cruel aggravating circumstances.

[2] In Strickland v. Washington, __ U.S. __, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the Supreme Court set forth the test under which we review claims of

ineffective assistance. See also Jarrell v. Balkcom, 735 F.2d 1242, 1261 (11th Cir. 1984). The petitioner must show both that his attorney faied to render "reasonably effective assistance," id. at 2064, and that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," id. at 2068. With some exceptions not applicable here, see id. at 2067; see also United States v. Cronic, __ U.S. __, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), the inquiry is two-pronged. The petitioner must show both ineffective assistance and resulting prejudice.

In this case, only one of Smith's claims -- that counsel should have more effectively impeached the Johnsons -- merits discussion and possible relief.

The claimed failure of his attorney to understand the bifurcated proceeding and act as an advocate is related to the failure to impeach issue. The other claims are either unsupported by the record or simply do not merit relief.[5]

Counsel's failure to depose Johnson does not warrant relief or a hearing; given the numerous inconsistent statements made by Johnson and his wife, counsel probably had no need to conduct such a deposition. Had a deposition produced testimony detrimental to Smith, it would have

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[5] For a discussion of the claims regarding erroneous jury instructions and the application of the heinous, atrocious and cruel aggravating factor, see infra section VII (discussing claims in context of ineffective assistance of appellate counsel). Our conclusion concerning these issues does not change in light of the different test for appraising the effectiveness of trial counsel.

been available to the state as evidence to disprove recent fabrication. (The state Rule 3.850 court held that Smith's counsel had available all the statements we have set forth above.) We are unable, without an evidentiary hearing, to reach a conclusion concerning ineffectiveness in light of counsel's failure to cross-examine Wesley or Patricia Johnson by using their pretrial statements, however.[6] The District court concluded that the attorney failed to use the statements for a valid strategic reason: he preferred to emphasize Johnson's plea bargain for impeachment purposes. Without a hearing,[7] we cannot hold this to be a

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[6] The entire transcript of the cross examination is attached to this opinion as Appendix A.

[7] A hearing will also be helpful to clarify the record. See supra note 2.

valid reason for counsel's failure to use the Johnsons' statements not implicating Smith. Use of these statements would have been totally consistent with counsel's assumed strategy of showing that Johnson implicated Smith only to save himself from the electric chair.

We also hold that counsel's failure to use the statements may well have resulted in prejudice under the test in Strickland v. Washington. The entire case of the state, with the exception of plaster casts of a tire track and a shoe print,[8] was based on the testimony of Wesley Johnson as buttressed by Patricia Johnson's testimony during the state's rebuttal

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[8] The tire track matched Smith's car's tires; the shoe print matched a pair of shoes Smith owned. Smith explained that he had loaned the car, with the shoes in the back, to Johnson.

case. When first questioned, however, neither witness implicated Smith: the September 6 statements[9] of both witnesses omit any reference to Smith. Only after Patricia Johnson conferred with Wesley on September 10 did Wesley implicate Smith -- stating that Smith was involved, but that a plea bargain discussion must occur before he would provide any further information.

Two conclusions may be drawn from these facts. The first is that Wesley and Patricia Johnson "framed" Smith, as Wesley's recantations would indicate. This conclusion is supported by the timing and order of the statements, and, to some

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[9] Other, more minor, inconsistencies appear among Johnson's statements. For example, Johnson's trial testimony cast Smith more as the ringleader than did his statement made after September 10.

extent, by Johnson's admission on September 6 that he locked his first victim in the car trunk and set the car on fire. Smith's attorney might well have argued that Johnson -- who had a history of similar murders -- implicated Smith to avoid "the chair," as Johnson stated in his note. The second, contradictory conclusion is that Wesley simply omitted any reference to Smith for some unknown reason -- and later told the truth. This interpretation is supported by Johnson's suspicious reference to a second car in his September 6 statement without elaborating concerning its source or its dirver. Nevertheless, the choice between the two interpretations would have been one the jury could have made either way had they heard the facts. The jury's choice could well have affected the outcome of the

trial.

The failure of counsel to use these statements to impeach the Jonhsons may not only have affected the outcome of the guilt/innocence phase, it may have changed the outcome of the penalty trial. As we have previously noted, jurors may well vote against the imposition of the death penalty due to the existence of "whimsical doubt." In rejecting the contention that the Constitution requires different juries at the penalty and guilt phases of capital trial, we stated:

> The fact that jurors have determined guilt beyond a reasonable doubt does not necessarily mean that no juror entertained any doubt whatsoever. There may be no reasonable doubt -- doubt based upon reason -- and yet some genuine doubt exists. It may reflect a mere possiblity; it may be but the whimsy of one juror or several. Yet this whimsical doubt -- this absence of absolute certainty -- can be real.

> The capital defendant whose guilt seems abundantly demonstrated may be neither obstructing justice nor engaged in an exercise in futiltity when his counsel mounts a vigorous defense on the merits. It may be proffered in the slight hope of unanticipated success; it might seek to persuade one or more to prevent unanimity for conviction; it is more likely to produce only whimsical doubt. Even the latter serves the defendant, for the juror entertaining doubt which does not rise to reasonable doubt can be expected to resist those who would impose the irremedial penalty of death.

Smith v. Balkcom, 660 F.2d 573, 580 - 81 (5th Cir. Unit B 1981), modified, 677 F.2d 20, cert. denied, 459 U.S. 882, 103 S.Ct. 181, 74 L.Ed.2d 148 (1982). in this case, use of Wesley and Patricia Johnson's prior inconsistent statements might have created a whimsical doubt that would discourage the court and advisory jury from recommending the death penalty.

Of course, counsel may have elected

to choose another strategy at the penalty portion of Smith's trial. If he did so, however, the record does not reveal the content of the strategy. For example, in counsel's closing statement at the penalty phase,[10] he evidenced no reasonable strategy. Counsel stated (in full):

> MR. HADDOCK: May it please the Court? Ladies and gentlemen, this is the last time we will be beore you. The most trying circumstances, the fact that will be sent back to you will be cumulative of what you have already decide, that the defendant is guilty. Now, with little help except from you -- and you are not here to help me, you are here to do the right thing -- I have to ask that you take into consideration all of the things

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[10] We note that counsel was somewhat confused by the bifurcated proceeding in any event. He repeatedly requested that the judge abandon the bifurcated procedure and use the procedure declared unconstitional in Furman v. Georgia, 408 U.S. 238, 92 S.cT. 2726, 33 L.Ed.2d 346 (1972).

> that have been said, all of the things that have been admitted into evidence. In particular, consideration to the statements of Dr. Kaplan pertaining to Mr. Smith.
>
> Weigh those, because they weigh heavily upon everybody in this room. Add them up. If they indicate to you that this man, who has made a statement that you can take or leave -- because you have taken and left some of his statements --- that he would spend the rest of his life in a penitentiary. Whether this man should die or be given the right to live until, God willing, someday this state will provide a place for him.

If the state desires to do so, on remand it is free to introduce evidence before the district court showing that trial counsel's failure to utilize the Johnsons' statements at either the guilt/innocence or penalty phases of the trial was prompted by reasonable trial strategy.

B. The Brady Issue

Smith contended before the state Rule 3.850 court that he did not receive material evidence from the state before trial pursuant to his request under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The state court held a hearing and concluded that the requested material was available to Smith's counsel. Smith now contends that this finding of fact by the state court is incorrect and not entitled to a persumption of correctness under 28 U.S.C. §2254(d) because his trial counsel never testified at the hearing. He notes that the testimony at the hearing indicated that the prosecutor, although he maintained an "open file" policy, could not recall whether the various statements were in the file at any particular time. Smith himself testified that

he could not recall seeing or hearing about the statements, except for the statement made after September 10 by Wesley Johnson.

We do not hold that these circumstances support a finding that the hearing was not full and fair;[11] indeed, we see no need to pass on this question. When the district court conducts its hearing on the effectiveness of Smith's counsel, the inquiry will by necessity involve the availability of the statements. For example, the state might produce Smith's counsel and introduce his testimony that he did not use the statements because he did

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[11] For example, Smith does not explain why he could not have deposed his attorney, even if he was unable to subpoena him. Cf. Birt v. Montgomery, 725 F.2d 587, 590 n.5 (11th Cir. 1984) (en banc) (noting possiblity that petitioner could depose witness without passing on sufficiency of state hearing).

not have them. If he did not have them because he did not check the prosecutor's file, this would constitute ineffective assistance given the content of the statements. But, if the statements were not available, counsel could not use them.

If the district court should conclude after an evidentiary hearing that the statements were not available to trial counsel, Smith will be confronted with a variation of Catch-22 created in part by 28 U.S.C. §2254(d). The state could presumably argue that state court's finding that the statements were available is a historical fact entitled to a presumption of correctness, but that counsel rendered effective assistance under the circumstances because the statements were, in fact, unavailable. Such a situation no doubt results from the difficulties inherent in

the administration of justice by means of the writ of habeas corpus. Nevertheless, if this situation arises, the district court should conclude that, under 28 U.S.C. §2254(d)(3), "the material facts were not adequately developed at the state court hearing," see Thomas v. Zant, 697 F.2d 977, 980 (11th Cir. 1983), and issue the writ under Brady v. Maryland.[12] We have no doubt that statements were "material either to guilt or to punishment" under Brady. 737 U.S. at 87, 83 S.Ct. 15 1196.

C. Recantations of Wesley Johnson

Finally, Smith contends that the

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[12] Smith correctly notes that the state court's finding was supported by somewhat weak evidence. In addition, the state court did not hold an evidentiary hearing on Smith's effective assistance of counsel contention, although he requested a hearing.

district court should also receive evidence concerning the post-trial recantations of Wesley Johnson. A panel of this court recently addressed a similar claim in Drake v. Francis, 727 F.2d 990 (11th Cir. 1984). This court vacated the opinion in Drake for en banc consideration, and we recently received briefs and heard oral argument on several issues raised in Drake. We see no need to hold this case pending the decision in Drake, however. We perceive that the panel in Drake accurately stated the law in this circuit concerning claims of newly discovered evidence in habeas corpus proceedings.

As long ago as 1958, the former Fifth Circuit Court of Appeals summarized the law in this area: "Newly discovered evidence in the form of a confession by another does not render the conviction void

and subject to collateral attack by habeas corpus because it goes to the merits of the conviction, not its legality." Shaver v. Ellis, 255 F.2d 509, 511 (5th Cir. 1958), cert. denied, 355 US. 864, 78 S.Ct. 98, 2 L.Ed.2d 70 (1957). To be distinguished are situations in which the new evidence bears directly on the constitutionality of the conviction. For example, in Schneider v. Estelle, 552 F.2d 593 (5th Cir. 19877), the petitioner claimed new evidence would show that the state had suborned perjury in obtaining a conviction against the petitioner. The court remanded for an evidentiary hearing, holding that the writ should issue if the petitioner proved the allegations of his complaint. Id. at 596; see also Smith v. Florida, 410 F.2d 1349 (5th Cir. 1969).

[3] In this case, we seriously

doubt that Smith has alleged subornation of perjury by the state. To prove such a claim, Smith would have to show that the prosecutor or the police officers knew that the testimony of one of the Johnsons was false. Schneider, 552 F.2d at 595; Smith, 410 F.2d at 1350 - 51. Smith has made no proffer of any evidence supporting such a contention. Absent such evidence, this claim does not warrant habeas corpus relief.

II. COERCION OF TESTIMONY

Smith next contends that Johnson confessed and agreed to testify for the state only because of Johnson's fear of the death penalty. Smith notes that one of the terms of Johnson's plea bargain required him to testify before he received his sentence. Smith argues that he should have received an evidentiary hearing on

the issue in the district court.

We have little difficulty accepting the validity of the argument that Johnson entered into his plea bargain agreement with the state and testified against Smith because of the possible imposition of the death penalty. Nevertheless, the district court properly held that this claim affords Smith no basis for relief.

[4] We have substantial doubt that this claim is one that warrants relief. Cf. United States v. Ballard, 586 F.2d 1060 (5th Cir. 1978); Chaney v. Wainwright, 561 F.2d 1129 (5th Cir. 1977), 443 U.S. 904, 99 S.Ct. 3095, 61 L.Ed.2d 871 (1979). It is clear that Smith's attorney cross-examined Johnson and revealed the facts underlying Johnson's testimony to the jury, which decided whether or not to believe Johnson. We need not consider this

issue on its meritS, however, because Smith failed properly to raise it under Florida procedure. The Florida courts have refused to address the issue, see Smith v. State, 400 So.2d 956, 959 (Fla. 1981); and, absent a showing of cause for failure properly to preserve the isssue and resulting prejudice, the issue is barred from review in the federal courts, Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct 2497, 53 L.Ed.2d 594 (1967) Smith has shown neither cause nor prejudice.

III. ADMISSION OF EVIDENCE OF SECOND DEGREE MURDER

At Smith's trial, the judge allowed Wesley Johnson to testify concerning the facts of a second murder for which Smith was not on trial. (The circumstances and content of this testimony are set forth in the portion of the Florida Supreme Court's opinion quoted in the introductory portion

of this opinion.) The Florida court apparently admitted this testimony on the theory that it constituted part of the res gestae. See Smith v. State, 365 So.2d 704, 706 n.2 (Fla. 1978). Smith contends that the evidence was irrelevant, inflammatory, prejudicial, and inadmissible as a matter of constitutional law.

[5 - 7] In reviewing the disposition of this claim by the district court, we note that "[i]n order for an evidentiary ruling to be cognizable in habeas corpus, it must deprive the state court defendant of fundamental fairness." Jameson v. Wainwright, 719 F.2d 1125, 1126 (11th Cir 1983), cert. denied, __ U.S. __, 104 S.Ct. 2355, 80 L.Ed.2d 827 (1984); see also Hills v. Henderson, 529 F.2d 397 (1976). A denial of fundamental fairness occurs when the evidence is "material in the

sense of a crucial, critical, highly significant factor." id. at 1127. Under this test, the admission of the evidence did not violate the Constitition, although its admissiblity under state law presents a close and difficult question. See 365 So.2d at 708 (three Justices dissenting).

IV. TESTIMONY OF PATRICIA JOHNSON

[8] At Smith's trial, the state introduced the testimony of Patricia Johnson, Wesley Johnson's wife. (Wesley Johnson was the prosecutor's essential witness. See supra §I.) The prosecutor called Patricia Johnson to testify concerning prior consistent statements made by her husband in response to Smith's impeachment. The witness list submitted to Smith before trial by the prosecutor did not include Patricia Johnson's name, as Florida law requires. In addition, the

record shows that Patricia Johnson was present during a portion of the trial that preceded her testimony and was thus in violation of the sequestration rule. Smith argues that the omission of Patricia Johnson's name from the witness list and the sequestration rule violation compels the issuance of the writ. Smith, however, cites no authority to the effect that these violations are of constitutional dimension. See, e.g., Bronstein v. Wainwright, 646 F.2d 1048 (5th Cir. 1981) (state law violations do not usually warrant habeas relief). Assuming that the claim is simply one rooted in the concept of "fundamental fairness," see Donnely v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 432 (1974), we conclude that these violations (if they were

violations)[13] did not render Smith's trial fundamentally unfair.

V. TESTIMONY OF DR. NISWONGER

[9] Dr. Joseph K. Niswonger, a psychiatrist, examined Smith before trial. Niswonger testified that, during the examinaion, Smith claimed amnesia concerning the event of the murder. The state argued to the jury that this testimony contradicted Smith's alibi that he did not commit the murder, but was at home "sleeping off a drunk." Smith now contends that, under the rule of Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), Niswonger's testimony was inadmissible because Niswonger did not read Smith

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[13] The prosecutor explained the omission of Patricia Johnson's name from the list and her presence in the courtroom by contending that he had not forseen that he would call her as a witness.

Miranda warnings before conducting the psychiatric examination. See also Battie v. Estelle, 655 F.2d 692 (5th Cir. 1981). The state contends that this claim is barred from consideration by Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1976), and that the claim also fails on the merits. The state's argument concerning the merits of this claim is correct; we therefore chose not to address the Wainwright issue, which presents a question of law not yet squarely addressed by this court.

The record in this case shows that the trial court did not appoint Niswonger to examine Smith, as was the case in Estelle v. Smith. On the contrary, Smith retained Niswonger (through his trial counsel) to conduct an examination regarding a possible claim of insanity. In such

a case, Estelle v. Smith does not require that the psychiatrist give Miranda warnings.[14] The protections of Estelle do not apply unless the psychiatist is "essentially . . . an agent of the State . . . " 451 US. at 467, 101 S.Ct. at 1875.[15] thus, the district court properly denied the writ on this issue.

VI. DISPARITY IN SENTENCING

[10] After the penalty hearing, the

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[14] Smith apparently does not contend that all psychiatrists examining all defendants must give Miranda warnings to remind the defendant not to make a statement he later may regret.

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[15] Smith contends that the trial judge's post-trial order adding Niswonger to the list of state psychiatrists made Niswonger an agent of the state. This contention is without merit. The judge's revision of the list did not change Niswonger's de facto status during the examination or at trial.

trial judge sentenced Smith to death. Wesley Johnson, in accordance with his plea bargain, received a sentence of only twenty-five years in prison. Smith contends that this disproportionate punishment violates the Constitution given his "lesser culpability" than Johnson. He requests this court to conduct an independent review of the record and grant relief on this issue, citing as support Barclay v. Florida, __ U.S. __, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983). This contention lacks merit. See generally Pulley v. Harris, __ U.S. __ 104 S.Ct. 871, 79 L.Ed.2d 29 (1984); Collings v. Francis, 728 F.2d 1322 (11th Cir. 1984); Moore v. Balkcom, 716 F.2d 1511 (11th Cir. 1983), cert. denied, __ U.S. __, 104 S.Ct. 1456, 79 L.Ed.2d 773 (1984); Henry v. Wainwright, 721 F.2d 990 (5th Cir. Unit B

1983), cert. denied, __ U.S. __, 104 S.Ct. 2374, 80 L.Ed.2d 846 (1984).

VII. INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

[11] Smith next contends that the district court should have granted him an evidentiary hearing on his claim that his appellate counsel rendered constitutionally ineffective assistance. We recently described the legal basis for this type of claim in Alvord v. Wainwright, 725 F.2d 1282 (11th Cir. 1984), as follows:

> Although we address claims of ineffective assistance of counsel on appeal much less frequently than claims of ineffective assistance at trial, it is well established that a defendant has the right to effective counsel on appeal. See Anders v. California, 386 U.S. 738, 741 - 42, 744, 87 S.Ct. 1396, 1398 - 99, 1400, 18 L.Ed.2d 493 (1966) (counsel must function as advocate on behalf of client). In order to prevail, Alvord must prove that he did not receive "'reasonably effective

representation,'" Mylar v. Alabama, 671 F.2d 1299, 1300 (11th Cir. 1982) (citing previous cases), cert. denied, [U.S.] 103 S.Ct. 3570, 77 L.Ed.2d 1411 (1983); however, counsel need not provide perfect assistance, id. From the reported cases, it appears that counsel's failure to file a brief is in most cases ineffective, see Anders; Mylar; however, counsel's failure to advance erors on appeal later gaining "judicial recognition" does not contittute unconstitutional aid. Sullivan v. Wainwright, 695 F.2d 1306, 1309 (11th Cir), cert. denied, [U.S.] 104 S.Ct. 290, 78 L.Ed.2d 266 (1983), and counsel need not brief issues reasonably considered to be without merit, Mendiola v. Estelle, 635 F.2d 487, 491 (5th Cir. Unit A. 1981); Hooks v. Roberts, 480 F.2d 1196, 1197 - 98 (5th Cir. 1973), cert. denied, 414 U.S. 1163, 94 S.Ct. 926, 39 L.Ed.2d 116 (1974). Alvord contends that the issues not raised by his counsel were of substantial merit As we stated in Hooks, the best way to evaluate "this question . . . is to examine the alleged trial errors to see if they contain sufficient merit . . . that his appellate counsel can be faulted for not having raised the." 480 F.2d at 1197.

Id. at 1291. Under the applicable standards, we conclude that Smith's counsel rendered constituionally effective assistance and that no evidentiary hearing is required.

Smith first contends that his counsel should have challenged on appeal the admissibility of photographs of the victim's body during the penalty phase of the trial. We cannot fault Smith's attorney for omitting this claim. The photographs were clearly relevant to the case because the state relied on the "heinous, atrocious, or cruel" aggravating circumstance enumerated in the Florida statute. See Fla. Stat. §921.141(5)(h). The circumstances of the crime as evidenced by the condition of the victim's body are material to consideration of this aggravating circumstance. In addition, under Florida

law, it appears to be settled that such photographs are admissible. See Calloway v. State, 189 So.2d 617 (Fla. 1966); Mardorff v. State, 143 Fla. 64, 196 So. 625 (1940).

Smith next contends that his counsel should have argued that the Florida procedure providing for a bifurcated sentencing hearing is unconstitutional. This contention lacks merit. The Supreme Court specifically upheld this statute in Proffitt v. Florida, 428 US. 242, 96 S.Ct. 1960, 49 L.Ed.2d 913 (1976), and we recently rejected this claim in Smith v. Balkcom, 660 F.2d 573, 580 - 81 (5th Cir. Unit B 1981), modified, 677 F.2d 20, cert. denied, 459 U.S. 882, 103 S.Ct. 181, 74 L.Ed.2d 148 (1982).

Smith argues that his counsel should have challenged the trial court's decision

to admit Dr. Niswonger's testimony at the penalty phase of his trial. Counsel need not have raised this claim on the basis of the fifth amendment; we have decided above that such a challenge lacks merit. See supra §V. In addition, counsel could reasonably have concluded that Smith had waived the psychiatrist-patient privilege by introducing Dr. Niswonger's report as to Smith's sanity into evidence at the competency hearing. See Fla. Stat. §90.242(b) (providing for waiver of privilege).

Smith also argues that his appellate attorney wrongly failed to challenge the trial court's finding of the "heinous, atrocious, or cruel" aggravating circumstance. See Fla. Stat. §921.141(5)(h). Smith contends that Johnson's testimony at trial demonstrated that the "participants"

thought the victim to be dead after they kidnapped him, transported him a considerable distance in a car trunk, struck him with a tire tool (while he pleaded for mercy), stabbed him with an ice pick, and locked him back in the car trunk. Thus, although the medical reports later showed that the victim died when the participants poured gasoline on the car and burned it, the murderer(s) could not have known they had done anything except destroy evidence. Under Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), Smith contends that this was not a proper case for application for the subsection (5)(h) circumstance. We believe Smith's counsel could reasonable decide not to raise this issue on appeal.

Smith next contends that his appellate counsel should have challenged the

trial court's jury instructions, which did not explain that the state must prove the existence of aggravating circumstances beyond a reaonable doubt. See Williams v. State, 386 So.2d 538 (Fla. 1980). The district court noted: (1) that trial counsel never requested such a charge, and (2) that the jury never was charged concerning any burden of proof except that of beyond a reasonable doubt. We hold that, under the circumstances, counsel need not have raised this issue on appeal. See Alvord, 725 F.2d at 1292 (instruction never requested); Henry v. Wainwright, 721 F.2d 990, 995 (5th Cir. Unit B 1983) (jury never heard instruction on any other burden of proof), cert. denied, __ U.S. __, 104 S.Ct. 2374, 80 L.Ed.2d 846 (1984).

Finally, Smith contends that his attorney should have requested the court

reporter to transcribe the entire voir dire proceedings to determine whether a violation of Witherspoon v Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), occurred. This contention is purely speculative; Smith has not shown that, in fact, a violation occurred. Thus, Smith has neither alleged nor proven that the failure of his attorney to raise this issue made any difference whatsoever.

VIII. MISCELLANEOUS ISSUES

[12] Smith contends that the death penalty in Florida has been discriminatorily applied on the basis of the race of the victim; he argues that the district court erred in refusing to grant an evidentiary hearing on this issue. The district court acted properly; as the state notes, this issue has been conclusively resolved adversely to Smith. See Sullivan

v. Wainwright, 721 F.2d 316 (11th Cir. 1983), application for stay denied, Sullivan v. Wainwright, __U.S.__ , 104 S.Ct. 450, 78 L.Ed.2d 210 (1983); Wainwright v. Ford, __ U.S. __, 104 S.Ct. 3498, 81 L.Ed.2d __ (1984); Adams v. Wainwright, 709 F.2d 1443, 1449 (11th Cir. 1983), cert. denied, __ U.S. __, 104 S.Ct. 745, 79 L.Ed.2d 203 (1984); Washington v. Wainwright, 737 F.2d 922, 923 (11th Cir. 1984).

[13] In this section of his brief, Smith also challenges the use of non-record material by the Florida Supreme Court in reviewing his case. This issue has also been resolved adversely to Smith. See Ford v . Strickland, 696 F.2d 804 (11th Cir. 1983) (en banc), cert. denied, U.S. __, 104 S.Ct. 201, 78 L.Ed.2d 176 (1983).

[14] Smith also argues that his sentence is unconstitutional because of the trial judge's faulty instruction to the jury concerning aggravating and mitigating circumstances and because the trial judge misapplied the law concerning the use of the circumstances by relying on an unconstitutional circumstance. Without belaboring this point, we hold that the district judge correctly decided that this claim is barred by a procedural default under Wainwright v. Sykes. Smith contends that he has proffered facts entitling him to an evidentiary hearing on the issue of cause and prejudice, but we disagree. As to the claims concerning restrictions of mitigating evidence, Smith has failed to show prejudice for exactly the reasons enumerated in Ford v. Strickland, 696 F.2d at 812 - 13. And, as to the claim of

reliance on an unconstitutional aggravating circumsantce, Smith has failed to proffer any evidence or explanation constituting cause for his failure timely to raise this issue in the state court.

The judgment of the district court is AFFIRMED IN PART, VACATED IN PART, and REMANDED for proceedings not inconsistent with this opinion.

APPENDIX A

CROSS-EXAMINATION OF WESLEY JOHNSON

EXAMINATION BY MR. HADDOCK:

Q. Mr. Johnson, you are putting me in the unique position of asking you a direct question, which I doubt I will get a straight answer from you about it.

MR. CAMPBELL: Now, Your Honor,--

Q. When are you lying, then or now?

THE COURT: Mr. Haddock, I don't want any dialogue of that sort.

MR. HADDOCK: That was a proper question, Your Honor.

THE COURT: Ask a question, but I don't want dialogue. I don't want editoralizing.

MR. HADDOCK: Prior to asking any question, Your Honor, I would like at this time to move for a mistrial in this case because of the unnecessary presentation of evidence over my prior objection out of the absence of the jury pertaining to a separate crime for which this defendant has been individually indicted and upon which there is a separate case before the Court, and upon which the defendant stands the possibility of subsequent trial.

THE COURT: Motion denied.

MR. HADDOCK: This is so horrendous, it's so prejudicial --

MR. CAMPBELL: How many times do we have

to go through the same thing, Your Honor?

THE COURT: Just a moment, Mr. Campbell. Go ahead.

MR. HADDOCK: May I finish, Your Honor? This is so horrendous and prejudicial to the defendant's cause before the jury that I see virtually no way of ever getting it straightened out.

THE COURT: Motion denied.

Q. Answer my question, Mr. Johnson.

MR. CAMPBELL: I thought that question was objected to.

THE COURT: You will have to reask the question.

Q. Are you telling the truth now or when you testified to the police officers?

A. I am telling the truth now.

Q. Let me ask you something. Have you ever seen this before [indicating]?

A. Yes.

Q. What is it?

A. That is a confession, I suppose, it's a note I sent [indicating].

Q. Was it written by you?

A. Yeah.

Q. Signed by you as Jake?

A. Yeah

Q. Is that a name you are known by from time to time?

A. Yeah.

Q. How was it, what was disposed--what was the disposition of this note, if you know?

A. It was at a time when I was thinking about cutting him loose.

Q. Speak up.

A. At a time when I was thinking about cutting him loose.

Q. Was it addressed to--did you have it sent to Smitty?

A. Yes.

MR. HADDOCK: Your Honor, I would like to introduce this into evidence.

MR. CAMPBELL: No sir, not--

THE COURT: It would be proper to identify it now and introduce it later.

MR. HADDOCK: I think I can introduce it since he is the State's witness.

MR. CAMPBELL: No sir, you can't introduce it in the State's portion of the case.

THE COURT: That's right. You mean the Court's witness?

MR. HADDOCK: The Court's witness.

THE COURT: It will be identified as Defendant's Exhibit 1. [The purported confession was marked as Defense Exhibit 1 for identification.]

Q. Does this note say, can you read that note?

A. Do you want me to read it out loud?

Q. Read it to the jury, yes.

A. "Hey, Slick, how are you doing? Okay? Well, the next time they say court, it's for real. Just keep cool. You can have Parks called because I made sure he heard me talking about how I done it by myself and it's like that. Just heard on the news that they, they are going to bring back the chair, I hope I miss it. Well, just stay cool, Jake."

Q. And Jake is you?

A. Part-time.

Q. That's right? You are Jake?

A. Sometimes.

Q. What is you deal with the state?

A. 25 to life.

Q. How many crimes did you confess to?

MR. CAMPBELL: Judge, that--

A. Three.

MR. CAMPBELL: -- Your Honor, I don't have

any objection to those related to--no. I withdraw the objection I believe the answer was three.

THE COURT: That's correct.

Q. And you say what, 25 to life?

A. [Nods head.]

Q. Were there any stipulations pertaining to that?

A. What do you mean, to the sentence?

Q. Yes.

A. That I testify.

Q. Testify to what?

A. To the murders.

Q. Did it have anything to do with the implication of the defendant here, Mr. Smith?

A. Yes.

Q. And that was part of the deal?

A. That I testify to the murders for the state, yeah.

Q. And have you been sentenced yet?

A. No, not that I know of.

Q. Is it your understanding that you will not be sentenced until after you give your testimony?

A. Right.

Q. Therefore your testimony is based upon your not going to the electric chair, is that right?

A. Well, I'm talking, uh, yeah, I suppose so

Q. Your are frightened of going to the electric chair, aren't you?

A. Scared to death.

Q. Jake, how long had you been drinking before you got involved in this thing?

A. Um, off and on during the day.

Q. Had you had any narcotics?

A. No.

Q. Any sort of marijuana or anything

other than alcoholic beverages?

A. No.

Q. How much alcoholic beverages had you drunk?

A. That's hard to say.

Q. Well, kind of work on it a little bit, see what you can come up with. It hasn't been too hard for you to say a lot of other things.

MR. CAMPBELL: Your Honor--

A. I'm thinking.

THE COURT: Mr. Haddock, don't do that.

A. Maybe a case before I met up with him.

Q. A case of what?

A. Maybe three or four six-packs.

Q. Four would be twenty, twenty-four beers, is that correct?

A. I suppose.

Q. Were your drinking short beers of

long ones?

A. Short.

Q. Were you drunk?

A. I was feeling all right.

Q. How come you said in your deposition you were trying to decide whether you were going to get out and puke if you were feeling all right?

A. Well, you know, pretty gross scene is going on.

Q. The alcohol didn't have anything to do with it?

A. Not very much.

Q. Did you drink, you said something about you may have had some whiskey during this time, I believe, whatever kind of testimony it was you gave to the state?

A. Right.

Q. So you mixed whiskey with possibly 24 beers in the course of the day?

A. Yes.

Q. You are just clear-headed as you can be, you remember everything that went on?

A. Pretty much so.

Q. Are you an alcoholic?

A. I don't know.

Q. You drink 24 beers everyday?

A. Sometimes more.

Q. Sometimes more?

A. Yeah.

Q. How much do you weigh?

A. How much do I weigh?

Q. Yes sir.

A. About 150.

Q. 150?

A. I guess about.

Q. You don't know?

A. Not really, sir.

Q. So you are in a position now-- let me see if I have got this straight--of having

given testimony against Mr. Smith with the promise from the state that if you did so you, who admit that you were involved in crimes, will get sentence of from 25 years to life?

MR. CAMPBELL: Your Honor, I don't think that is the correct statement of the situation. I don't think the state promised him a thing.

THE COURT: You will have the opportunity to ask questions on redirect.

MR. HADDOCK: Thank you, Your Honor.

MR. CAMPBELL: All right.

MR. HADDOCK: Will you reread him the question to make sure he got it?

[The reporter read back the previous question.]

A. It's not 25 to life. It's a life sentence, whereas on first degree murder I have to do at least 25 years before I am

eligible for parole is the type of life sentence I will be receiving. And if I don't get off then, between now and then, the next 25 years I plan on making parole.

Q. Was there additional promises that these sentences would be together instead of one after the othr?

A. Concurrently, yes.

Q. In other words, you would get a concurrent sentence, only one life sentence?

A. Yes sir.

Q. Any other witnesses other than you and Birdman and Smith?

A. Not that I know of, no.

Q. So there is just you now and Smith?

A. Right.

Q. That's the way it is, isn't it?

A. Right.

Q. And you got 25 years if you behaved yourself, and we don't know what Smith has

got, is that right?

A. Right.

MR. HADDOCK: That's all, Your Honor. No further inquiry.

EXAMINATION BY MR. CAMPBELL:

Q. Mr. Johnson, you have, have pled no defense to--Mr. Haddock asked you how many crimes you have confessed to and you said three. You have pled no defense to each of those three crimes?

THE COURT: Mr. Campbell, may I see you and Mr. Haddock:? [The following conference was held at the bench outside the hearing of the jury:]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

DENNIS WAYNE SMITH,

Plaintiff,

v. CASE NO. 83-136 CIV-T-10

LOUIE L. WAINWRIGHT,

Defendant.

MEMORANDUM OPINION

This is a habeas corpus proceeding pursuant to 28 USC §2254 brought by a state prisoner under sentence of death. Execution was most recently scheduled to be carried out on February 15, 1983. This petition was filed on February 9 and, of necessity, I granted a stay on February 14 in order that the Petitioner's many claims might be considered. The complete record has now been compiled and the parties have fully briefed their respective positions.

FACTS SURROUNDING THE OFFENSE

John Mitchell Arnsdorff was murdered in Polk County, Florida, on July 29, 1975. According to the testimony of Wesley Johnson the murder was perpetrated by the Petitioner, Dennis Wayne Smith, aided and abetted by Johnson and a third accomplice named Wagner.

Smith was indicted on August 29, 1975, and charged with first degree murder. He entered a plea of not guilty and the case proceeded to trial on March 23-26, 1976. Prior to the start of petitioner's trial, Johnson pled nolo contendere to the Arnsdorff murder as well as two other homicides. He was later given concurrent life sentences in each case in exchange for his testimony against Smith.

Johnson testified that he, Smith and Wagner met at a bar and decided to rob a

homosexual in order to obtain money for beer. The three then went to another bar where they met the victim, Mitchell Arnsdorff. On the pretext of giving a party, they invited Arnsdorff to the place where Johnson was living. The four men drank beer for a short while and then Johnson grabbed the victim while Wagner threatened him with an ice pick. While Arnsdorff was restrained Smith took Arnsdorff's wallet, in which there was $6.00, and one of the three removed his wrist watch. They then forced Arnsdorff into the trunk of his own car, intending to abandon him in a remote spot. Wagner and Johnson, in Arnsdorff's car, were following Smith in his car when they ran into a bridge abutment, flattening a tire. After an unsuccesful attempt to repair the tire, the two cars proceeded until the disabled Arnsdorff vehicle

became stuck in the sand. One of the three men then opened the trunk of the car and Smith hit Arnsdorff with a tire tool while Wagner began to stab him with the ice pick. Believing Arnsdorff to be dead, they closed the trunk and left the scene to go to a gas station. Smith told Wagner to get some gas, which he did. They then returned to Arnsdorff's car and, at Smith's direction, Johnson doused it with gas and set it afire.*

At this point in Johnson's narration, the court excused the jury to allow the defense to renew a pre-trial motion to exclude testimony of a second murder committed by Petitioner and Johnson. The court denied the motion, as it had

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* Dr. James L. Holoman, a pathologist and medical examiner testified earlier that Arnsdorff died from incineraton or asphyxiation from smoke caused by the fire.

previously, on the ground that the second murder was part of a single transaction and therefcre, relevant to the Arnsdorff murder.

Johnson then testified that after burning the Arnsdorff car he, Smith and Wagner immediately went to a swimming hole. An argumment about the division of the $6.00 and the watch ensued between Smith and Wagner. Smith told Johnson to grab Wagner, and while Johnson held him, Smith stabbed Wagner with the ice pick. At Smith's direction Johnson pulled Wagner into the swimming hole and held him under water to ensure his death. Afterward they transported Wagner's body elsewhere and buried it.

Smith testified in his own defense. He admitted that he was in the company of Wagner and Johnson on the night of the

murder, but claimed that the robbery was their idea. Although he acknowledged accompanying them to the second bar and that he left it with them and the victim, he testified that they drove him straight from the bar to his apartment because he was too intoxicated by beer and drugs to do anything but sleep. According to Smith, that was the last he saw of them that night. No evidence was introduced by the defense to corroborate the alibi.*

HISTORY OF THE CASE

Petitioner was found guilty as charged and a sentence of death was imposed by the Court in accordance with the jury's recommendation. On appeal to the Florida Supreme Court Petitioner raised two

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* It should also be noted that the state had earlier introduced evidence of Petitioner's footprints being found at the scene of the crime.

issues: (1) the admissibility of Johnson's testimony during the guilt phase of the trial concerning the second homicide (the murder of Wagner) committed subsequent to the Arnsdorff murder; and (2) the imposition of the death penalty upon the Petitioner when an accomplice (Johnson) who had pleaded nolo contendere to three murders, received concurrent life sentences in return for his testimony. The Florida Supreme Court affirmed Petitioner's conviction and sentence of death on November 9, 1978. Smith v. State, 365 So.2d 704 (Fla. 1978). Petitioner then sought review by certiorari from the Supreme Court of the United States, but the petition was denied on October 1, 1979. Smith v. Florida, 444 US. 883, 100 S.Ct. 177 (1979).

After the Florida Cabinet denied his

request for clemency, and after he was originally scheduled to be executed on June 3, 1981, Smith filed in the state trial court a motion to vacate his judgment and sentence pursuant to Florida Rule of Criminal Procedure 3.850. He asserted, as he does in this proceeding, a large number of claims including an alleged Brady violation.*

The trial court concluded that the majority of Smith's claims were not appropriate in a post-conviction proceeding brought under Florida Rule of Criminal Procedure 3.850 and it denied the motion without an evidentiary hearing.

Smith appealed to the Supreme Court of Florida, and also filed a petition for habeas corpus and a petition for leave to

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* Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

apply for a writ of error coram nobis. A stay of execution was granted pending disposition of those proceedings. Except for the alleged Brady violation, the Supreme Court affirmed the trial court's denial of post-conviction relief, denied habeas corpus and denied the petition for writ of error coram nobis. The case was then remanded to the trial court to hold an evidentiary hearing on the claimed Brady violation. Smith v. State, 400 So.2d 956 (Fla. 1981)

After the remand and following an evidentiary hearing, the trial court again denied Smith's motion for post-conviction relief and the Supreme Court affirmed on appeal. Smith v. State, 421 So.2d 146 (Fla. 1982).

On January 20, 1983, the Governor signed a second death warrant ordering the

execution of the Petitioner between noon on February 11, 1983 and noon on February 18, 1983. Execution was scheduled for February 15, 1983. On February 9, 1983, Smith filed the present petition for federal habeas corpus relief, and a motion for stay of execution; and a stay was granted on February 14 pending consideration of the Petitioner's many claims. The Petition asserts nineteen separate contentions, each of which will be considered in turn*

I

The Petitioner's first claim is that his conviction violates his right to due process under the Fifth and Fourteenth

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* The state does not suggest that any of Petitioner's claims are unexhausted insofar as available state remedies are concerned.

Amendment;* his right to the effective assistance of counsel under the Sixth Amendment; and his right to regularity in the imposition of capital punishment under the Eighth Amendment, all because the principal witness against him (Wesley Johnson) has since recanted his testimony and the recantation constitutes "newly discoverd evidence" requiring a new trial.

It appears, factually and more specifically, that since the Petitioner's trial Wesley Johnson has signed an affidavit and has authored other written statements and letters explicitly recanting his trial testimony and exculpating the Petitioner by assuming to himself sole responsibility for the Arnsdorff and Wagner murders.

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* Since all of petitioner's claims are derived through the Fourteenth Amendment, repetitious citation of that Amendment will be avoided.

Under the law of Florida the procedural mechanism to be pursued in seeking a new trial on the ground of newly discovered evidence, after a conviction has been affirmed on appeal, is to apply to the appellate court for leave to petition the trial court for a writ of error coram nobis. Hallman v. State, 371 So.2d 482 (Fla. 1979). It must be shown, among other things, that the new evidence concerns facts not previously known and that, had they been known at trial, they conclusively would have prevented the entry of judgment. Ibid.

Thus, in this instance, as a part of his post-conviction proceedings in the state courts, Petitioner has previously sought permission from the Supreme Court of Florida to pursue this claim by writ of error coram nobis, but permission was

denied. Smith v. State, 400 So.2d 956, 960 - 962 (Fla. 19881). In essence, the Florida court held that the facts (i.e., Johnson's exculpation of the Petitioner) were not new in the sense that Johnson had made a similar statement exculpating the Petitioner before the trial; that the resulting inconsistency between his pretrial statement and his testimony at trial was made known to the jury during Petitioner's trial; and, accordingly, the Court determined that it could not be conclusively stated that the result of the trial would have been precluded by the "newly discovered evidence" in the form of a post trial recantation.

In his Petition and supporting brief in this Court the Petitioner argues only that Johnson's pretrial statements exculpating the Petitioner were unsworn while

his post trial recantation was under oath; but no authority is cited to demonstrate that this is a meaningful difference in the context of evaluating "newly discovered evidence" as an asserted basis for a new trial. Neither does the Petitioner cite any authority for his ultimate claim that Johnson's post trial recantation somehow implicated his federal constitutional rights; and it should be noted in that respect that the approach taken by the Supreme Court of Florida in evaluating a witness's recantation as newly discovered evidence is perfectly consistent with the law of the Eleventh Circuit in passing upon similar claims in the federal system. It is clearly established federal law that recantations are "looked upon with the utmost suspicion" and that a new trial should be granted only when the Court is

satisfied both that the trial testimony was false and that a different result might have been reached without it. United States v. Smith, 433 F.2d 149 (5th Cir. 1970).

The Petitioner's first claim fails to demonstrate any deprivation of rights having constitutional significance.

II

Petitioner's second claim is that he was denied his right to due process of law under the Fifth Amendment because the prosecution used coerced testimony at his trial. The contention is that Wesley Johnson's trial testimony was coerced because he confessed and agreed to testify against the Petitioner only because of his own fear of the death penalty.

No authority is cited for the proposition that the threat of a death penalty,

and an agreement to testify in order to avoid it, is somehow coercive as a matter of law with the result that such testimony is incompetent or unusuable. Indeed, analogous authority is to the contrary. See Chaney v. Wainwright, 561 F.2d 1129 (5th Cir. 1977), and United States v. Ballard, 586 F.2d 1060 (5th Cir. 1978), holding that confessions are not rendered involuntary and inadmissible because of fear of the maximum legal sanction and a desire to secure more lenient treatment.

Wesley Johnson's plea bargain, and his other motivations for testifying against the Petitioner, were fully explored during his cross examination and were available for the jury's consideration in assessing his credibility as a witness. There was no violation of Petitioner's constitutional rights in the admission of

Johnson's testimony at trial.

Alternatively, as to this claim (and a number of others), the state also asserts that it was waived under the rule of Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497 (1977), due to a lack of objection at trial, a present failure to show any "cause" and "prejudice" relating to the failure to object, and the refusal of the Florida Supreme Court to consider the issue precisely because of its contemporaneous objection and procedural default rule. The Florida Court held (Smith v. State, 400 So.2d 956, 958 (Fla. 1981)):

> Initially, we hold that with the exception of the alleged Brady violation and the challenge of ineffective assistance of trial counsel, Smith's claims are inappropriate to a proceeding under rule 3.850. The remaining allegations, except his claims of ineffective assistance of appellate counsel and alleged improper consideration by use of a

> psychological report, were matters which were or could have been raised and disposed of on direct appeal and are not proper subject matters for a post-conviction motion. Hargrave v. State, 396 So.2d 1127 (Fla. 1981); Witt v. State, 387 So.2d 922 (Fla.), cert. denied, __ U.S. __, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980). The trial court, therefore, properly refused to consider these allegations.

Thus, even if it had been determined that the Petitioner's constitutional rights had been infringed, the state correctly contends that the claim could not be considered.

The Petitioner's third claim is that he was denied his right to due process of law under the Fifth Amendment; his right to effective assistance of counsel under the Sixth Amendment; and his right to regularity in the imposition of capital punishment under the Eighth Amendment when the Supreme Court of Florida refused to

consider the newly discovered evidence in the form of Johnson's post trial recantations.

This claim is intertwined with, and dependent upon, the Petitioner's first claim. Having already decided that claim adversely to the Petitioner's position, it follows that this claim is also without merit for the same reasons previously stated.

IV

The Petitioner's fourth claim is that he was denied his right to due process of law under the Fifth Amendment; his right to the effective assistance of counsel under the Sixth Amendment; and his right to regularity in the imposition of capital punishment under the Eighth Amendment because the prosecution withheld exculpatory evidence at trial contrary to its

obligations under Brady v. Maryland, 373 U.S. 83 S.Ct. 1194 (1963).

The essence of this contention is that the prosecution did not disclose or produce certain pretrial statements made by Johnson and his wife to investigating police officers, and that those statements were exculpatory because they made no reference to the Petitioner or were otherwise inconsistent and could have been useful for purposes of impeachment at trial.*

When this claim was initially asserted in the state trial court as a part of the Petitioner's post conviction proceeding under Rule 3.850 of the Florida Rules of Criminal Procedure, that court refused

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* These statements are more specifically described in the opinion of the Florida Supreme Court, 400 So.2d 963, f.n.1.

to consider the claim as inappropriately raised in that context. On appeal, the Supreme Court of Florida reversed that holding and remanded for an evidentiary hearing on the Brady issues. Smith v. State, 400 So.2d 956 (Fla. 1981).

On remand, an evidentiary hearing was held before the trial court on August 4, 1981. The Petitioner was in attendance and was represented by counsel. His attorney at trial was not present, having moved out of the state; but the record of the hearing reveals that Petitioner's new lawyers had previously conferred with trial counsel by telephone. The hearing proceeded and the state offered testimony by the prosecutor at trial that he had practiced open file discovery in preparing for the Smith trial; that he had disclosed his entire file to defense counsel (even

to the point of making a duplicate file for his use); and that each of the disputed statements had been in that file. No contrary evidence was offered by the Petitioner.

After the hearing the trial judge entered a written order denying relief and stating in part as follow:

> The conclusion is inescapable that the State provided all of the exhibits to the defendant, or made the defense aware of the existence of these exhibits. There is absolutely no basis for finding otherwise. Since the undersigned judge is convinced that these exhibits were either made available to the defendant, or the defendant was made aware of their existence, it is not necessary to determine the value to his defense.
>
> In any event, it is the belief of this court that none of the statements were favorable to the defendant. Even the first statement by Wesley Irving Johnson was a clear indication that some unnamed person participated

> in the subject crimes. It was "childs play" police work to make the association which implicated the Defendant, Dennis Wayne Smith.

This conclusion was thoroughly reviewed on appeal by the Supreme Court of Florida and was affirmed. Smith v. State, 421 So.2d 146 (Fla. 1982).

Accordingly, the state now contends that the Petitioner has received a full and fair hearing of these issues in the state courts and that this Court is bound to give a presumption of correctness to the state court's findings under those circumstances pursuant to 28 USC §2254(d) and Sumner v. Mata, 449 U.S. 539, 101 S.Ct. 764 (1981).

The Petitioner responds by narrowing the claims made in his petition and now asserts that, although he was afforded a hearing, "said hearing did not comply with

the requirements of 28 USC §2254[d](2), (3), (6), (7), and (8)." Petitioner's Supplemental Memorandum, p. 8. Three arguments are advanced: first, that the trial court's findings are not supported by the record; second, that the failure of his counsel at that hearing to secure the presence of his trial counsel as a witness prevented adequate development of the material facts; and, third, that the trial court may have prejudged the issues.

The first and third of these contentions are simply without merit. The record <u>does</u> support the findings of the trial judge, and the suggestion that the court prejudged the issue is, at best, frivolous speculation. Indeed, the record of the evidentiary hearing reveals painstaking consideration. The second argument also fails because, among other

things, there is simply no current allegation or showing that the presence of Petitioner's trial counsel at the hearing would have contributed anything of value. In fact, Petitioner's then counsel reported to the Court during the hearing that he had spoken to trial counsel by telephone, and trial counsel simply had no recollection of the matters in the issue.

A full and fair hearing was conducted, the trial Court's findings are amply supported by the record and are presumptively correct. No further proceedings are warranted in this Court on that issue. Sumner v. Mata, supra.

The Petitioner's fifth claim is that he was denied his right to due process of law under the Fifth Amendment because of the use of "inflammatory inadmissible

evidence of separate murder" at his trial.*

This contention relates to Johnson's testimony concerning the murder of Wagner, and it restates the issue which became the focal point of Petitioner's direct appeal to the Supreme Court of Florida following his conviction. See Smith v. State, 365 So.2d 704, 706 - 707 (1978). The Florida Court held, applying its own pertinent precedents in Williams v. State, 110 So.2d 654 (Fla. 1959) and Ashley v. State, 265 So.2d 685 (Fla. 1972), that the evidence of the Wagner homicide was properly admitted as part of a single transaction which spanned the night of, and included, Arnsdorff's murder. As such, the Court, concluded, the evidence concerning the second

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* Petitioner's brief expands this claim to assert an Eighth Amendment violation as well.

murder was relevant to place Smith at the scene of the first since it established that he was with the people involved in the first homicide just an hour after it took place.

Whether this evidentiary determination was correct or incorrect is a fairly debatable question. Indeed, the Supreme Court of Florida divided four to three on the issue with the three dissenting justices expressing the view that the probative value of the evidence was outweighed by its prejudice. If the issue had arisen in the federal system, governed by Rules 403 and 404(b), F.R.E., it would be an equally troublesome point as to which this Court or the Court of Appeals might (or might not) reach a result contrary to that reached by the state courts. See United States v. Beechum, 582 F.2d 898, 909 - 916

(5th Cir. 1978) (en banc).

The important point here, however, is the principle that the federal courts cannot be concerned with the mere propriety or impropriety of state evidentiary rules or their applicaton in individual cases. A state's interpretation and application of its own law or rules is no basis for habeas corpus relief since no federal constitutional issue is presented. See e.g., Bronstein v. Wainwright, 646 F.2d 1048 (5th Cir. 1981); Monk v. Blackburn, 605 F.2d 837 (5th Cir. 1979); Davis v. Wainwright, 547 F.2d 261 (5th Cir. 1977); Hall v. Wainwright, 493 F.2d 37 (5th Cir. 1974). Absent a showing of fundamental unfairness amounting to a denial of substantive due process of law, even a misapplicaton of a state rule or law is not reviewable by way of federal habeas corpus.

Forbes v. Estelle, 559 F.2d 967 (5th Cir. 1977); Starling v. Estelle, 651 F.2d 1082 (5th Cir. 1981).

The Petitioner argues that the evidentiary ruling of which he complains in this instance amounted to a deprivation of due process, but neither a reading of the record or the citation of any established authority supports that conclusion. No issue of constitutional dimension is presented by this claim.

VI.

The Petitioner's sixth claim is that the prosecution during his trial commented upon his custodial silence in violation of his Fifth Amendment rights.

It appears that, following his arrest, the Petitioner made a statement to interrogating officers but did not tell them (as he testified at trial) that he

had loaned his car to Johnson on the night of the Arnsdorff murder. The prosecutor cross examined him concerning that inconsistency or omission.

The disposition of the claim of a Fifth Amendment violation on these facts is squarely governed by Lofton v. Wainwright, 620 F.2d 74 (5th Cir. 1980), distinguishing Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240 (1976). There is no merit to Petitioner's contention.*

VII.

The Petitioner's seventh claim is that he was denied his right to due process of law under the Fifth Amendment and his right to confront the witnesses and have effective assistance of counsel under

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* The State also contends that there was a Wainwright v. Sykes waiver regarding this claim (see page 10, supra), and the State is correct.

the Sixth Amendment because a witness for the state, not shown on the state's pre-trial list of witnesses,* was permitted to testify; and further, that this circumstance also violated the rule of sequestration because the disputed witness had previously been in the courtroom for a portion of the trial proceedings.

During the state's rebuttal case at trial the prosecutor announced his intention to call as a witness Patricia Johnson, the wife of Wesley Johnson. His stated purpose, in view of the cross examination of Wesley Johnson, was to have her testify concerning prior consistent statements made by Johnson. Compare Rule 801 (d)(1)(B), F.R.E. The prosecutor explained

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* Rule 3.220(a)(1)(i) of the Florida Rules of Criminal Procedure, unlike Rule 16, F. R. Crim. P., requires the state to furnish on demand a list of witnesses.

that he had not listed her as a witness because he had not anticipated that her testimony would become admissible or necessary. He also drew attention to the fact that she had been in the courtroom during an earlier portion of the trial, but argued that she was not in violation of the rule of sequestration precisely because she was not then a contemplated witness. The trial judge entertained a proffer of her testimony in question and answer form out of the presence of the jury, and then overruled the defense objections, permitting her to testify.

There was simply no error in this procedure, much less error of constitutional magnitude; and, even if there had been some mistake in the interpretation or application of state procedural or evidentiary rules, no relief is available in

this Court in a collateral proceeding under 28 USC §2254. See authorities cited, supra, page 16. Furthermore, as to this claim also, the State correctly asserts a Wainwright v. Sykes waiver because the point was not preserved on appeal to the Supreme Court of Florida. See, Ford v. Strickland, 696 F.2d 804, 816 - 817 (11th Cir. 1983) (en banc).

VIII

The petitioner's eighth claim is that he was denied his right to due process of law and a fair and impartial trial under the Fifth Amendment because the trial judge gave an informal "Allen Charge" to the jury.

The petition alleges, more specifically that as the jury was about to retire at 4:55 p.m. to commence deliberations the trial judge remarked that "if we approach

the hour of 7:00 o'clock it's going to be my conclusion you will have to be sequestered for the night." The jury subsequently returned with its verdict at 6:45 p.m., and from this sequence of events it is argued that the verdict was coerced.

A review of the record reveals that the remark of the trial judge as quoted in the petition was taken entirely out of context.

The trial began on March 23, 1976. At the end of the day's proceedings an unreported bench conference was held during which, obviously, one or perhaps both of the parties orally moved the court to sequester the jury. (R 170) The judge then addressed the jury, informing them that a request for an order of sequestration had been made, and stating further (R 171):

> "Now, I have never sequestered a jury during the presentation of testimony. I have often done it when the jury has retired to deliberate, and that might become necessary here, but you have this choice. You may go to your homes for this evening and return in the morning individually if you will do as you are told, or you can be housed together at local accommodations under security."
>
> (emphasis supplied)

The judge then proceeded to instruct the jury in forceful terms concerning their duty to avoid improper communications, and extracted individual pledges of fidelity in lieu of sequestration. (R 173)

The following day, March 24, lunch was provided for the jury in the jury room (R 728); but the judge said (R 279):

> "However, because of the monotony, it is anticipate [sic] that should we be together at the noon hour tomorrow we will make arrangements for you to have lunch together in sequestration at the restaurant."

The next and last day of the guilt phase of the trial, March 25, the Court explained to the jury at some length that a "sequestered lunch" would be provided at a local restaurant (R 486 - 487); and he concluded his explanation with the declaration and order: "You are sequestered, which means you will remain apart from everyone." (R 487) Later that afternoon, after the summations of counsel and the delivery of his charge, the judge said (R 629 - 630):

> THE COURT: All right. You will also take the instructions just read.
>
> You may retire, elect your foreman who will preside over your deliberations and sign a single form of verdict after you have arrived at your verdict.
>
> Informally, I have advised -- what did you find, Sergeant Moor?
>
> THE BAILIFF: I have two blocks of rooms.

> THE COURT: All right, we will see how it goes. If we haven't gotten a verdict -- understand, your deliberations are what you want to do. No one controls you, but arrangements have to be made, and I think you would be more comfortable knowing what our plans are so that you might communicate with your family; but if we approach the hour of 7:00 o'clock it's going to be my conclusion you will have to be sequestered for the night.
>
> You will be permitted to use the telephone and, and assuming that you need help that you can't get from a family member, the bailiff will assist you.

Clearly, given the total context in which it was made, the judge's remark -- "if we approach the hour of 7:00 o'clock it's going to be my conclusion you will have to be sequestered for the night" -- was merely intended to inform the jury of his plans and their status in order that they might communicate with their families; and the suggestion that such remark

was coercive or otherwise rendered the trial so fundamentally unfair as to deprive the Petitioner of constitutional due process is utterly without merit.*

IX

The Petitioner's ninth claim is that his Fifth Amendment privilege against self incrimination was infringed, and his Sixth Amendment right to effective assistance of counsel was denied, because a court appointed psychiatrist was permitted to testify concerning his interview with the Petitioner and statements made by the Petitioner during that interview.

During the pretrial stages of the case Petitioner's trial counsel, pursuant to Rule 3.210(a), (b) and (c), Florida

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* Alternatively, the state's assertion of a Wainwright v. Sykes, waiver as to this claim is also correct.

Rules of Criminal Procedure, filed a formal notice of intent to rely upon the defense of insanity. (R 5)* Subsequently, he also filed pursuant to the same rule (as did the state) a written motion suggesting insanity and requesting that the court appoint not more than three disinterested experts to conduct an examination and determine the Petitioner's competency both at the time of the offense as well as the time of trial. (R 18; 20) In response to those motions, by order entered October 27, 1975 (R 21), the court appointed the staff of the Mental Health Center of Polk County; and, in accordance with that order, the Petitioner was examined on two occasions in November by Dr.

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* Compare Rule 12.2, F. R. Cr. P. requiring the filing of a similar notice in the federal system.

Bert Kaplan, a clinical psychologist who was the Director of the Forensic Unit of Mental Health Center. (R 719 - 721)

In the meantime, the Petitioner's trial counsel also engaged a psychiatrist, Dr. Joseph K. Niswonger. (R 480; 495) who examined the Petitioner on December 29, 1975, and January 7, 1976. (R 507)* Then, on March 22, 1976, immediately prior to the scheduled trial date, the court conducted a sanity hearing at the request of Petitioner's counsel; and, during that hearing, the Petitioner filed and offered in evidence the written reports that had been made by both Dr. Kaplan and Dr. Niswonger. (R 31; 489 - 505). The court

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* It will be assumed, as asserted in the petition, that the Petitioner was not given any Miranda warnings during any of his psychological or psychiatric examinations.

found the Petitioner competent to stand trial and the case proceeded.

At trial, during the rebuttal phase of the state's case, the prosecutor called Dr. Niswonger as a fact witness (R 478 et. seq.) to have him testify (in accordance with his written report) that the Petitioner had claimed amnesia during his interviews with him, the claim of amnesia or lack of memory being inconsistent with Petitioner's testimony given in his own defense at the trial.

Accordingly, the assertion now made in the petition in this court that the state was permitted to call a "court appointed" psychiatrist, and that Petitioner's Fifth Amendment rights were compromised in the process, is a gross distortion of the record. Dr. Niswonger was not court appointed; he was privately engaged

by the Petitioner through his trial counsel, and was listed as a witness for the defense. (R 480) There were no Fifth Amendment implications; and the question whether the communications between Petitioner and the doctor were privileged in nature under state law was carefully sorted out by the trial judge who correctly ruled that the privilege, if any, had been waived when the Petitioner offered Dr. Niswonger's report in evidence at the sanity hearing. (R 595)

If the state had called as a witness Dr. Kaplan,* the court appointed expert, when the Petitioner had not

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* The Petitioner called Dr. Kaplan as a witness during the penalty phase of the trial (R 719); and the petition also complains that his cross examination by the state offended Estelle v. Smith, but that decision is clearly inapposite to any case in which the witness is called by the defendant himself.

offered evidence in support of his insanity defense at trial, relief might well be warranted on the basis of Battie v. Estelle, 655 F.2d 692, 702 - 703 (5th Cir. 1981), extending the holding of Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866 (1981), even to situations in which appointment of the court appointed examiner is initially sought by the defendant himself. But those authorities obviously have no application to conversations between a defendant and a privately retained expert as to which no element of state compulsion is involved. The Petitioner's ninth claim is wholly without merit.

Alternatively, the State correctly contends that this claim was also waived under Wainwright v. Sykes, due to a failure to present and preserve the point on direct appeal.

X

The Petitioner's tenth claim is that he was denied due process of law under the Fifth Amendment and his right to regularity in the imposition of capital punishment under the Eighth Amendment because he " . . . was sentenced pursuant to a statute which allows unbridled prosecutorial discretion in making the decision to prosecute for capital offenses or to enter plea arrangements for non-capital offenses" (Petition, page 26).

Any otherwise colorable arguments which might be advanced in support of this claim are foreclosed by the Supreme Court's decision in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960 (1976).

XI

The Petitioner's eleventh claim is that he was denied due process of law and equal protection of the law under the

Fifth Amendment, and his right to regularity of capital sentencing under the Eighth Amendment, because the death penalty has historically been discriminatorily applied.

This claim is also foreclosed by Proffitt v. Florida, supra, and Spinkellink v. Wainwright, 578 F.2d 592 (5th Cir. 1978).

XII

The Petitioner's twelfth claim is that he was denied due process and equal protection of the law under the Fifth Amendment, and regularity of capital sentencing under the Eighth Amendment, because his co-offender, Wesley Johnson, was allowed to plead guilty in exchange for a life sentence.

The petition and supporting brief argue at length that Johnson was even more

culpable in the Arnsdorff murder than was Smith, and that the Petitioner's sentence of death was therefore disparate and arbitrary. In urging this contention, however, the Petitioner does nothing more than challenge factual findings made by the Supreme Court of Florida. On Petitioner's direct appeal (Smith v. State, 365 So.2d 704, 708 (Fla. 1978)), the Court held:

> Since Johnson did not receive a death sentence, Smith argues that the death sentence was improperly imposed upon him. He relies upon this Court's decision in Slater v. State, 316 So.2d 539 (Fla. 1975), in support of his position.
>
> We find that this case is not controlled by Slater, wherein the 'trigger man' received a life sentence while Slater, an accomplice who did not have the murder weapon in his hand, received the death penalty. We reduced Slater's sentence to life. As evidenced by the record and the express findings of the trial judge, Smith's

> culpability in the murder of Arnsdorff was much greater than that of Johnson. Smith originated the idea and directed Johnson to pour gasoline on the vehicle containing Arnsdorff and to ignite the vehicle. The record in no way suggests that Smith was acting under Johnson's domination. To the contrary, Johnson was dominated by Smith on this particular evening. We find that, under the peculiar circumstances of this case, the disparity in sentences between Smith and Johnson is justifiable and is neither unreasonable nor capricious.

These findings by both the trial court and the Supreme Court of Florida were not "so unprincipled or arbitrary as to somehow violate the United States Constitution." Barclay v. Florida, __ U.S. __, 103 S.Ct. 3418, 3423 (1983). On the contrary, they are supported by the record and are not now subject to relitigation under 28 U.S.C. §2254(d). Sumner v. Mata, supra.

XIII

The Petitioner's thirteenth claim is that he was denied due process of law under the Fifth Amendment, his right to effective assistance of counsel under the Sixth Amendment, and his right to regularity in capital sentencing under the Eighth Amendment because evidence of non-statutory aggravating circumstances was admitted during the penalty phase of his trial.

Florida Statute 921.141(1)(1975), as it existed at the time of Petitioner's trial, previously determined to be constitutional in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960 (1976), provided in part as follows:

> In the [penalty phase of a capital felony trial] evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the

> aggravating or mitigating circumstances enumerated in subsections (6) and (7). Any such evidence which the court deems to have probative value may be received regardless of its admissiblity under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitutions of the United States or of the State of Florida.

Pursuant to that provision, and during the penalty stage of the trial after the Petitioner had been found guilty by the jury, the state offered the testimony of two probation officers and a police detective. Petitioner's trial counsel objected (R 685 - 686) on the ground that the testimony did not relate to any of the statutory aggravating circumstances enumerated in Florida Statute 921.141(5) (1975). The trial court overruled the

objection in view of the liberality of the statute regarding the admission of evidence (R 686 - 687), and the testimony was presented.

The essence of the testimony of the two probation officers was that the Petitioner was on probation for an offense involving the sale of marijuana; that he had not been a satisfactory probationer in several respects; and that, in fact, he had violated the terms and condition of his probation. The police detective testified to hearsay information that the Petitioner was involved in the practice of santanism.

Despite the admission of this testimony, none of which was directly germane to any of the statutory aggravating circumstances,* the trial court

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* As to aggravating circumstances, Florida Statute 921.141 (5) (1975) provided:

properly instructed the jury that "aggravating circumstances are limited by statute to the following" etc. (R 755, emphasis supplied).

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(5) AGGRAVATING CIRCUMSTANCES--Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

The jury returned its advisory verdict recommending the death penalty. (R 761 - 762). On the next day the trial judge, as the ultimate sentencer under the Florida statutory scheme, entered his written findings required by Section 921.141(3) "weighing the aggravating and mitigating circumstances." (R 788 - 790)

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

Although the judge remarked in the preamble to his statutorily structured findings that "the defendant is a dangerous person" (R 788), he actually found only one statutory aggravating circumstance -- that the Petitioner's offense was especially heinous, atrocious and cruel. He explicitly found that "no mitigating circumstance of any substance was produced" (R 789);* and he therefore concluded

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*As to mitigating circumstances, Florida Statute 921.141(6) (1975) provided:

> (6) MITIGATING CIRCUMSTANCES -- Mitigating circumstances shall be the following:
>
> (a) The defendant has no significant history of prior criminal activity.
>
> (b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> (c) The victim was a participant in the defendant's conduct

that the statutory aggravating circumstance outweighed any mitigating circumstances, statutory or otherwise, thus requiring that the death penalty be imposed. (R 789 - 790).

The Petitioner's argument concerning the admission of the disputed testimony is based upon Proffitt v. Wainwright, 685

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or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.

(g) The age of the defendant at the time of the crime.

F.2d 1227, 1266 (11th Cir. 1982). See also Goode v. Wainwright, 704 F.2d 593, 603 (11th Cir. 1983). In Proffitt and in Goode, both involving the Florida sentencing scheme, the Court held that reliance upon a non-statutory aggravating circumstance by the sentencing judge violated the Eighth and Fourteenth Amendments even though other, valid aggravating factors were found to exist and no mitigating circumstances were present so as to require the balancing of exercise contemplated by the Florida Statute. This holding has since been undermined, however, by the more recent Supreme Court decision to the contrary in Barclay v. Florida, __ U.S. __, 103 S.Ct. 2733 (1983). See also, Zant v. Stephens, __ U.S. __, 103 S.Ct. 2733 (1983).

In Barclay and Zant the Supreme Court

held that consideration of non-statutory or invalid aggravating factors by the ultimate sentencing authority (the Georgia jury in Zant and the Florida judge in Barclay) did not render the sentence unconstitutional so long as (1) a valid aggravating circumstance was found to exist; (2) the improper factor which was also considered did not itself consist of constitutionally protected activity such as the expression of unpopular political views or the practice of a religion; and (3) there was, in the case of the Florida Statute, no finding of a mitigating circumstance which would require a balancing of aggravating against mitigating factors.

While Proffitt, Goode, Barclay and Zant are instructive with respect to the proper analysis to be made of this case, all are distinguishable. In each of those

cases the sentencing authority expressly articulated and demonstrably relied upon an invalid or non-statutory aggravating circumstance in imposing sentence. Here the trial court merely admitted some disputed testimony, much of which (consisting of the testimony of the probation officers) was admissible for another purpose anyway, namely, to negate the existence of a mitigating circumstance, i.e., that the defendant had no significant history of prior criminal activity. See Barclay, 103 S.Ct. 3427.

The more troublesome point involves the admission of the testimony concerning Petitioner's alleged indulgence in the practice of satanism which could arguably be a form of protected activity within the First Amendment.* If that testimony was

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*See Kennedy v Meacham, 540 F.2d 1057 (10th Cir. 1976).

relied upon by the sentencing authority as an aggravating circumstance, then even Barclay and Zant would probably require that relief be granted.

Citing Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532 (1931), the Petitioner argues that when a verdict could have been based upon either a constitutional ground or an unconstitutional ground, and the verdict is silent as to its foundation, it must be set aside because the jury "must have" considered the tainted evidence (Petitioner's brief, page 32). This argument fails, however, because the jury was expressly instructed by the trial judge that in making its decision to recommend or not recommend imposition of the death penalty, the jury was specifically limited to a consideration of the statutory aggravating circumstances

and no others. (R 755) In Zant the Court said (103 S.Ct. at 2745):

> One rule derived from the Stromberg case requires that a general verdict must be set aside if the jury was instructed it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground. The cases in which this rule has been applied all involved general verdicts based on a record that left the reviewing court uncertain as to the actual ground on which the jury's decision rested. [Citations omitted] This rule does not require that respondent's death sentence be vacated, because the jury did not merely return a general verdict stating that it had found at least one aggravating circumstance. The jury expressly found aggravating circumstances that were valid and legally sufficient to support the death penalty. (Emphasis supplied)

Accordingly, even though the jury in this case returned a general verdict (R 761), it had been instructed to consider

only the statutory aggravating circumstances and it must be presumed that the jury followed those instructions and found the existence of one of the statutory factors and no others* Stromberg has no application; and to the extent that admission of the evidence of satanism was error because it did not relate to a statutory

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*Indeed, the form of the jury verdict made specific mention of the limitation in the Court's charge:

> "We, the jury, having heard the evidence under the sentencing procedure in the above cause as to whether aggravating circumstances which were so defined in the Court's charge existed in the capital offense here involved, and whether sufficient mitigating circumstances as defined in the Court's charge to outweigh such aggravating circumstances, do find the advise that the aggravating circumstances do outweigh the mitigating circumstances." (Emphasis supplied.)

aggravating or mitigating circumstance, Zant teaches that such error simply does not rise to the level of constitutional magnitude. This is especially true in Florida, as distinguished from Georgia, because the jury's verdict was advisory only.

It is equally clear that the trial judge as the ultimate sentencing authority did not consider the evidence of satanism in imposing the death penalty. One of the principal thrusts of the Florida Statute, drawn in the wake of Furman v. Georgia,** was to require the trial court to "set forth in writing its findings upon which the sentence of death is based."*** This requirement, in turn, also "requires the

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**408 U.S. 238, 92 S.Ct. 2736 (1972).

***Florida Statute 921.141 (1977).

trial judge to focus on the circumstances of the crime and the character of the individual defendant." Proffitt v. Florida, 428 U.S. at 251, 96 S.Ct. at 2966 (1976). Thus, in his findings in this case, the trial judge restricted himself to the prescribed statutory consideration; he found that the offense was especially heinous, atrocious and cruel, a statutory aggravating circumstance not counterbalanced by any mitigating consideration, statutory or otherwise. No mention was made, and no reliance placed upon, Petitioner's alleged practice of satanism. Accordingly, under Barclay, the sentence was valid even if the admission of the disputed evidence was error. Its mere admission does not rise to the level of constitutional significance.

This claim is without merit; and, here again, the State correctly and alternatively asserts a waiver of the claim in any event under Wainwright v. Sykes, because the point was not preserved on direct appeal and was not thereafter considered to be appropriately raised in the Rule 3.850 proceedings in the state courts.

XIV

The Petitioner's fourteenth claim is that he was denied his Sixth Amendment right to the effective assistance of counsel at his trial.*

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*No evidentiary hearing was held on this issue in the state court although the claim was said to be properly raised, from a procedural standpoint, in a Rule 3.850 proceeding. The Florida Supreme Court affirmed the denial of relief without a hearing after applying the standards it adopted in Knight v. State, 394 So.2d 997 (Fla. 1981), for judging claims of ineffective assistance. Smith v. State, 400 So.2d 956, 959 (Fla. 1981). See also Armstrong v. State, 429 So.2d 287 (Fla.

The petition, as supplemented by the brief, points to the following specific claims of deficiency on the part of his retained lawyer at trial:

> (1) Failure to adequately assert an insanity defense;
>
> (2) Failure to depose Wesley Johnson before trial;
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> (3) Failure to depose the state's other witnesses before trial;
>
> (4) Failure to adduce mitigating evidence during the penalty phase;
>
> (5) Mishandling of the psychiatric testimony during the penalty phase;
>
> (6) Presentation of a meaningless closing argument;

1983), in which the Florida Court adhered to its decision in Knight notwithstanding the Eleventh Circuit's decision in Washington v. Strickland. Knight employs the "Decoster standard" -- proof that the error of counsel affected the outcome -- which was considered and rejected as too harsh in Washington.

(7) General indecisiveness, presentation of rambling arguments and failure to object to jury instructions.

Each of these assertions will be discussed in the order just stated.

A.

Although his counsel filed a pretrial notice of reliance upon insanity as a defense, the Petitioner's brief complains (at page 34) that " . . . no real insanity defense was in fact mounted on Petitioner's behalf by his privately-retained counsel. Rather, some poorly prepared and ineffective 'stabs' at such a defense may have been made by [counsel] -- but those were totally inadequate."

It is clear from the record that Petitioner's counsel filed the pretrial notice, required by the Florida rule, as a precautionary measure before the Petitioner was actually examined by Drs. Kaplan

and Niswonger. When neither expert was prepared to support the defense after their examination (see R 722), the issue was dropped. Moreover, there is no current allegation or showing that Petitioner was in fact insane; and, accordingly, no showing that he was prejudiced when the defense was abandoned. Besides, Petitioner testified at the trial, under oath, that he was not present at the scene of the murder and did not commit the crime.* There is no merit to this claim.

B.

The Florida Rules of Criminal

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*In Washington v. Strickland, 693 F.2d 1243, 1253 (11th Cir. 1983)(en banc), the Court aptly observed that some "lines of defense may be contradictory and thus incapable of being presented persuasively in tandem. For instance, an attorney might not present an alibi defense in conjunction with a justifiable homicide defense."

Procedure, Rule 3.220, unlike the Federal Rules, expressly provide for disclosure of the state's witnesses and the taking of pretrial depositions in criminal cases.

Petitioner complains that his counsel did not depose Wesley Johnson.

At first impression any lawyer would likely suppose that the most rudimentary preparation for a criminal trial would include deposing the state's star witness, given the procedural right to do so, and the fact that it wasn't done in this case presents the petitioner's most serious claim for relief. Upon full consideration of the record, however, I am persuaded that counsel's "failure" may well have been a matter of strategic choice and, in any event, Petitioner has not pointed to any "actual and substantial disadvantage to the course of his defense." Washington

v. Strickland, 693 F.2d 1243, 1262 (11th Cir. 1982) (en banc).

Wesley Johnson was the key witness. On the issue of Petitioner's guilt the other witnesses established or corroborated only so much as the Petitioner was prepared to admit in his own testimony* -- that he was with Johnson and Wagner on the night in question, and that the three of them left the Green Parrot in the company of Arnsdorff. Only Johnson could and did testify that Petitioner remained in their company and, in fact, became the principal actor in Arnsdorff's murder.

These circumstances were as obvious before the trial as they are now, and it was easy to anticipate what Johnson was

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*Except, perhaps, the testimony of FBI Agent Hegvold concerning the footprints found at the scene of the crime.

going to say; he was going to place the Petitioner at the scene and implicate him directly in the act of murder. In fact, defense counsel knew that would be Johnson's testimony because he had a copy of a lengthy statement taken from Johnson in question and answer form after Johnson had plead guilty and had agreed to testify. (Exhibit I to Petition; R 162). The only purpose in deposing Johnson, therefore, would lie in the hope of tying him to a detailed recitation which might later be useful for impeachment at trial as a prior inconsistent statement. But that approach would also entail a substantial risk, namely, the opportunity it would afford the witness to make a prior consistent statement in relation to his anticipated

testimony at trial.* In evaluating that risk cautious trial counsel would necessarily consider in the first instance whether he already had impeachment material in the form of an inconsistent statement or confession; and, if he did, he might well decide, and deliberately so, to forego the opportunity of a deposition because the prospect of profit would be slim and the potential cost great.

That was precisely the position of defense counsel in this case. He was already armed with Johnson's pretrial note to the Petitioner in which Johnson related

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*It is significant that the prosecution at trial successfully offered other prior consistent statements made by Johnson to his wife (see Part VII, pages 18 - 19, supra), and it is easy to imagine the glee with which the prosecution would have offered Johnson's sworn deposition, taken by the defense itself, if it had been sought and proved to be consistent.

that "I made sure he heard me talking about how I done it by myself . . . ," and he used that weapon during cross examination and closing argument at trial. (R 148; 152; 575) Counsel also had access to the inconsistent statements made by Johnson to the investigating police officers (see Part IV, pages 11 - 14, supra), and he had and used the question-and-answer statement or deposition Johnson had given after entering his plea. (see R. 155)

It was defense counsel's manifest strategy during trial to attack Johnson's credibility primarily on the basis of his plea bargain with the state under which he escaped the death penalty himself in exchange for his plea and his testimony against Smith, with actual imposition of sentence to be withheld until after he had testified. Counsel made that point during

his cross examination, together with the fact that Johnson had taken sole responsibility for the crime on another occasion, and he stopped. Other lawyers might have proceeded differently; and, because it has since become known that the jury elected to credit Johnson's testimony anyway, it is easy to suggest through hindsight that perhaps consel should have proceeded differently. That is not enough, however, to warrant a finding of constitutional insufficiency in the defense.

Under the circumstances of this case it cannot be said, in the language of Washington v Strickland, that counsel failed to investigate a plausible line of defense merely because he elected not to depose Johnson. He had other statements, even a confession by Johnson; and, as previously demonstrated, there was a rational

albeit debatable strategic reason for foregoing a deposition in those conditions. Moreover, although Petitioner argues in conclusory terms that "the lack of a defense deposition of that witness in and of itself must constitute ineffective assistance of counsel--or the very term has no meaning" (Petitioner's brief, page 34, emphasis in original), the fact remains that no articulable, "actual and substantial disadvantage" (Washington v. Strickland, 693 F.2d at 1262) is ever stated or demonstrated.

C.

The petition asserts (at pages 37 - 38) that not only did his counsel eschew the taking of Johnson's deposition, he did not depose any of the other witnesses either. Again, however, it is never articulated as to precisely how this failure

later worked to the Petitioner's "actual and substantial disadvantage." Indeed, as stated earlier, the Petitioner's own testimony at trial disputed only the critical testimony of Johnson concerning the Petitioner's presence and direct participation in Arnsdorff's murder. There was no constitutional deprivation here.

D.

The petition asserts that defense counsel failed to develop and present evidence during the penalty phase of the trial concerning four possible statutory mitigating circumstances. (See Petition, pages 38 and 42; Petitioner's brief, page 34). They are: (1) that the capacity of the Petitioner to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; (2) that the capital

felony was committed while the Petitioner was under the influence of extreme mental or emotional disturbance; (3) that the Petitioner had no significant history of prior criminal activity; and (4) that the Petitioner was an accomplice in the capital felony committed by another person and his participation was relatively minor.

The last of these assertions -- that Petitioner was a mere, less culpable accomplice -- is nothing more than a disputation of Johnson's testimony and is not supported by the record. The Petitioner, after all, had testified that he was not present and did not participate at all.

With respect to the other three areas of mitigation, and despite the assertions to the contrary, the record reveals that defense counsel did in fact present testimony concerning each of them. There was

testimony, for example, from both the Petitioner (R 369 - 370; 389 - 391; 397; 412; 419 - 422) and Dr. Kaplan (R 719 - 735) relating to Petitioner's inability to conform his behavior due to use of alcohol and drugs, as well as his mental or emotional disturbance; and, insofar as his limited history of prior criminal activity was concerned, Petitioner had testified (R 373 - 376) to two arrests involving marijuana (one in Illinois and one in Florida), and one extension of probation for fighting.

E.

The petition refers in passing to "mishandling of crucial psychiatric testimony" (Petition, page 38), presumably referring to the calling and examination of Dr. Kaplan by defense counsel during the penalty phase of the trial. Clearly,

however, the appropriate object of counsel was to attempt to develop (contrary to Petitioner's preceding claim of ineffective assistance) one of the statutory mitigating circumstances, and it is never demonstrated in any of Petitioner's papers how this aspect of the defense was "mishandled."

The Petitioner asserts that his counsel made a meaningless closing argument at the conclusion of the penalty phase of the trial (Petition, page 39).

Although the argument was brief, consisting of less than two pages in the record (R 753 - 754), and was also somewhat disjointed as reported, it says too much to characterize counsel's allocution as "meaningless." The effect of the presentation was to call attention to the testimony of Dr. Kaplan concerning the

Petitioner's drug abuse and his "significant psychological problems" (R. 722), and to commit him to the mercy of the jury. The approach did not succeed, but it would require the application of purely subjective judgment aided by hindsight to now conclude that it was so poorly conceived and presented as to fall below minimal constitutional requirements. A similar claim was made and rejected in Profitt v. Wainwright, 685 F.2d 1227, 1250 (11th CIr. 1982).

G.

Lastly, the petitioner makes a generalized claim that his counsel was indecisive and, for example, made no relevant objections to jury instructions. (Petition, page 40). No argument is advanced, however, as to which instructions were objectionable or on what grounds; and there

is simply no articulation of any "actual and substantial disadvantage" to the defense.

In asserting his various claims of ineffecitve assistance of counsel the Petitioner repeatedly emphasizes that no evidentiary hearing was held in the state courts, and he exhorts the court to conduct one in order to explore the undefined prejudice he claims to have suffered. No useful purpose would be served by doing so. An evidentiary hearing, even in a capital habeas case, is justified and should be conducted only when necessary to resolve sharply defined issues of fact; it should not be conducted merely as a fishing expedition to satisfy the desperate hope of new counsel that something might evolve - something that counsel cannot presently articulate except in the most general and conclusory terms.

No evidentiary hearing is justfied and no relief is warranted with regard to the Petitioner's claim of ineffective assistance of counsel at trial.

XV

In his fifteenth claim the Petitioner asserts that he was denied procedural due process and his right to a fair and impartial trial under the Fifth Amendment, and his right to regular capital sentencing under the Eighth Amendment because the trial judge's instructions to the jury limited the jury's consideration to statutory mitigating factors. In his instructions to the jury on mitigating circumstances the trial judge stated "(m)itigating circumstances by statute are:" and he then read the appropriate statutory language. (R. 756) The court later told the jury:

> When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided in Florida Statute 921.141(7) of the Florida Statutes. (R. 757, 758).

Significantly, however, the judge then elaborated upon that instruction by making the following statement: "(a)ll evidence of mitigating circumstances may be considered by the judge or jury." (R. 758) In Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983), the Court reviewed a nearly identical jury instruction and determined "that the jury did not perceive a restriction on the use of any mitigating evidence." Id. at 813.

The record reveals that the judge

read the statute as written* and did not expressly limit the jury's consideration to those mitigating factors enumerated in the statute. The Supreme Court determined in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 2965 - 2966, n.8 (1976), that the Florida Statute does not limit a jury's consideration of mitigating circumstances to only those listed in the statute.

In addition, a review of the record reflects that the Petitioner was not limited in the introduction of evidence which might be considered mitigating.**

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*Florida Statute 921.141(5) (1975) provided that "aggravating circumstances shall be limited to the following:" By contrast, subsection (6) began with the declaration "mitigating circumstances shall be the following:"

**Petitioner does not specify what non-statutory mitigating factors the jury should have considered.

The jury heard testimony during the trial concerning Smith's family background, education, work history, social relationships, and psychological history. (R. 370 - 373, 376 - 382, 388, 400)

Furthermore, the trial judge's sentencing order reflects his belief that neither he nor the jury was restricted to a consideration of only statutory mitigating circumstances. The judge stated:

> This Court does not find mitigating circumstances of any substance was produced. This Court can only conclude that sufficient aggravating circumstances exists and that there are not mitigating circumstances to outweigh the aggravating circumstances. (R. 789, 770)

The trial judge's instructions simply did not preclude the jury from considering nonstatutory mitigating factors. Accordingly, the claim is without merit.

Even assuming the jury instructions

were erroneous, the claim would be barred from consideration pursuant to Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct 2497 (1977). The Petitioner failed to make any specific objection at trial or to raise the issue on direct appeal.

In determining whether a procedural default on appeal bars federal habeas review of this issue, the Court in Ford v. Strickland applied the standard of prejudice enunciated in United States v. Frady, 456 U.S. 152, 102 S.Ct. 1584 (1982). Under the Frady test a petitioner must establish that the error worked to his "actual and substantial disadvantage." Id. at 171.

A review of the evidence proffered at trial which could be construed as nonstatutory mitigating circumstances fails to establish that there was a substantial

likelihood that Smith was actually and substantially prejudiced by the judge's instructions to the jury. In the absence of any showing of prejudice to the Petitioner, his failure to assert the issue on direct appeal results in a waiver under Wainwright v. Sykes and Ford v. Strickland.

XVI

Petitioner asserts as his sixteenth claim that he was denied procedural due process under the Fifth Amendment by the failure of the judge or jury to find mitigating circumstances.

After considering all of the evidence presented at trial and during the penalty phase of the proceedings, the trial judge determined that no mitigating circumstances were present, statutory or otherwise. (R. 789) Smith challenges this conclusion

contends that several statutory mitigating circumstances are supported by the evidence.

Specifically, he asserts that the following statutory mitigating factors were established:

> (1) The Defendant has no significant history of prior criminal activity.
>
> (2) The captial felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance.
>
> (3) The Defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.
>
> (4) The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

With regard to the Petitioner's assertion that the evidence supported a finding that he had no significant history

of criminal activity, the record reflects otherwise. The Petitioner testified to two arrests involving marijuana. The first arrest was for posession of marijuana and resulted in incarceration for one year. (R. 374) The second arrest was for the sale of marijuana and the Petitioner was placed on probation for three years. (R. 374) Before the three year term of probation expired, the Petitioner was arrested for fighting and his probation was extended for another year. (R. 375) Petitioner also testified that he was "picked up three or four times for violation of probation." (R. 376)

At the penalty phase, the State offered the testimony of two probation officers who testified that Smith was on probation for the sale of marijuana; that he had not been a satisfacty probationer; and

that he had violated the terms and conditions of his probation. (R. 677 - 681, 689, 690)

Taken together, the testimony of Smith and the probation officers would appear to negate rather than support the finding that the Petitioner had no significant history of prior criminal activity The "significance" of that criminal history may be an issue as to which reasonable persons could disagree; but the judge and jury were free to conclude that this mitigating consideration was not supported by the evidence.

The record also fails to support the Petitioner's claim that the judge and jury should have determined that he was merely an accomplice in the crime and that his participation was relatively minor. Wesley Johnson testified that Smith hit

Arnsdorff with a tire tool several times (R. 132), directed Wagner to buy some gas, and told Johnson to set the car containing Arnsdorff on fire. (R. 134) When the Petitioner took the stand he testified that he was not even present when Arnsdorff was killed. (R. 391, 418)

Such evidence either establishes Smith as the ringleader or as a nonparticipant; it fails to support a finding that he was a mere accomplice and only played a minor role in the crime.

Finally, in an effort to establish that at the time of the offense Smith was under the influence of extreme mental or emotional distubance and/or his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired, the defense presented the

testimony of Smith and a court appointed psychologist, Dr. Kaplan.

During the guilt phase of the trial, Smith testified that on the night in question he was under the influence of drugs and alcohol. (R. 369, 370, 389 - 391, 397, 412, 419 - 422).*

At the penalty phase, Dr. Kaplan testified to the Petitioner's emotional and psychological problems (R. 719 - 739) and the Petitioner took the stand for a second time to testify to his mental condition. (R. 740, 741)

The judge and jury considered the evidence and were not persuaded that the testimony was sufficiently credible to

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*Wesley Johnson had testified earlier in the trial that he and Smith consumed a considerable amount of liquor on the evening Arnsdorff was killed. (R. 118, 122, 130, 143).

establish the statutory mitigating circumstances. Dr. Kaplan also testified that the Petitioner knew the difference between right and wrong; and, crediting the testimony of Johnson, as the jury obviously did, there was evidence that Petitioner was in full possession of his physical and mental faculties at the time of the offense. The Petitioner does not assert that the judge or jury considered evidence they should not have considered nor does he allege that they failed to consider matters they should have considered. Petitioner merely disputes the weight given to the testimony.

Consideration of all mitigating circumstances is required by the United States Constitution, Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954 (1978), but the

decision of whether a particular mitigating circumstance in sentencing is proved and the weight to be given it rests with the judge and jury.

Petitioner was given ample opportunity to present evidence in mitigation at the trial. The jury and judge considered the evidence and determined that no mitigating factors, statutory or otherwise, were present. Such a decision was well within the domain of the judge and jury and the record fails to reveal any basis to disturb the trial court's findings. The claim is without merit.

XVII

In his seventeenth claim the Petitioner asserts that the Florida Supreme Court received and considered non-record psychiatric reports in reviewing his case in violation of his Fifth Amendment rights

to due process of law and to refrain from self incrimination, his Sixth Amendment right to confront witnesses against him and his Eighth Amendment right to regularity in the imposition of the death penalty.

The Florida Supreme Court rejected Smith's argument in Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981), cert. denied, 454 U.S. 1000, 102 S.Ct. 542 (1981); and, more recently, the Eleventh Circuit rejected the same argument in Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983). Ford controls this issue and in accordance with that en banc decision this claim has no merit.

XVIII

Petitioner asserts as his eighteenth claim that he was denied effective assistance of appellate counsel under the Sixth Amendment. Specifically, Petitioner

contends that his appellate counsel erred in not raising the following issues on direct appeal:

(1) Failure by the trial court to instruct the jury that aggravating circumstances must be found beyond a reasonable doubt;

(2) The trial court's instruction to the jury that the death penalty is presumed to be appropriate where the jury finds aggravating circumstances and no mitigating circumstances;

(3) Admission into evidence of two photographs of the decedent's body;

(4) A claim that Section 921.141, Florida Statute (1975), is unconstitutional because it does not require adherence to the Florida Rules of Evidence, particularly as to hearsay and denial of confrontation;

(5) Admission into evidence of the testimony of Dr. Niswonger, which was protected by the psychiatrist-patient privilege;

(6) Admission into evidence of non-statutory aggravating factors during the penalty phase;

(7) Restriction by the trial court of the jury's consideration of non-statutory mitigating circumstances;

(8) Failure to have the jury voir dire transcribed and reviewed by the Florida Supreme Court.

Each of these assertions will be discussed in the order just stated.

To the Petitioner's claim that the appellate counsel failed to assert on appeal the lack of a specific jury instruction that aggravating circumstances must be found beyond a reasonable doubt, the

State responds (1) that no authority is cited in support of the contention that such an instruction is required in the first place;* and (2) that appellate counsel could not have raised the point anyway because the issue was not preserved by trial counsel. Without pausing over those arguments, a review of the trial court's instructions to the jury belie the claim in any event. At the conclusion of the trial, and as a part of his final charge, the trial judge instructed the jury no less than twenty four separate times in various contexts that the State

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*The Supreme Court of Florida has held, nevertheless, that aggravating circumstances must be proved beyond a reasonable doubt. Williams v. State, 386 So.2d 538 (Fla. 1980). This is a "settled principle of Florida law." Ford v. Strickland, 696 F.2d 804, 819 (11th Cir. 1983) en banc.

must prove its case beyond a reasonable doubt. (R. 599, 600, 604 - 606, 615, 617, 619, 621, 624, 625, 627). The detailed definition of the "reasonable doubt" concept was stated in the most favorable terms. (R. 613 - 614)

At the conclusion of the penalty phase the judge again instructed the jury. He was not requested and did not reinstruct the jury concerning the state's burden of proof, but did instruct concerning the statutory provisions pertaining to the jury's function to weigh aggravating and mitigating circumstances and to make a sentencing recommendation to the judge.

All of the jury instructions were given on the same day, within a relatively short time of one another. Given the repeated instruction at the close of the guilt phase that the state must prove its

case beyond a reasonable doubt and the brief interval between instructions, it is clear that the jury was properly instructed that anything the State contended, including aggravating circumstances, must be proved beyond a reasonable doubt. Appellate counsel cannot be faulted for not raising this issue.

Petitioner's next assertion of ineffective assistance of appellate counsel refers to the Court's instruction to the jury that the death penalty is presumed to be appropriate where the jury finds aggravating circumstances and no mitigating circumstances. The court instructed the jury that:

> When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overidden by one or more of the mitigating circumstances . . . (R. 757 - 758)

The jury instruction properly states the effect of the Florida Statute as upheld in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960 (1976). There was no error by the Court and no mistake by counsel.

The Petitioner next complains that his appellate counsel did not assert as error the admission into evidence of the photographs of the decedent's body. It would have been futile to do so (and, for that reason, a bad appellate tactic also) because the law of Florida is well settled that photographs taken at the scene of the crime of the body of the deceased, and objects near or around it, may be admitted in evidence. Mardorff v. State, 143 Fla. 64, 196 So. 625 (1940). If otherwise competent and material, photographs of a corpse are admissible in evidence though they portray a gruesome spectacle and may

tend to arouse passion and resentment against the defendant in the minds of the jury. Calloway v. State, 189 So.2d 617 (Fla. 1966); Wilkins v. State, 155 So.2d 129 (Fla. 1963); Savage v. State, 38 So.2d 47 (Fla. 1948); Mardorff v. State, supra.

The Petitioner says his appellate counsel should have challenged the constitutionality of Florida Statute 921.141 because of its express departure from the exclusionary rules of evidence and alleged denial of the right of confrontation, but he does not presently demonstrate by persuasive argument or citation of authority that such a contention would have had any hope of success especially in light of Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960 (1976) declaring the statute to be constitutionally valid.

The Petitioner says his appellate counsel should have challenged the admission into evidence of the testimony of Dr. Niswoger because of the psychiatrist-patient privilege, but the basis for that contention has already been considered and rejected (see the discussion concerning claim IX, supra, pages 22 - 25).

The Petitioner says his appellate counsel should have challenged the admission into evidence of non-statutory aggravating factors during the penalty phase of his trial, but the basis for that contention has already been considered and rejected (see the discussion concerning claim XIII, supra, pages 28 - 36).

The Petitioner says his appellate counsel should have challenged the trial court's alleged restriction of the jury's consideration of non-statutory mitigating circumstances, but the basis for that

contention has already been considered and rejected. (see the discussion concerning claim XV, supra, pages 46 - 49)

The Petitioner says, lastly, that his apellate counsel should have had the voir dire proceedings transcribed and reviewed by the Florida Supreme Court, but no suggestion or representation is made that any Witherspoon* or other error actually occurred; and, even if it had, it was not preserved for review in the Supreme Court of Florida (see Sullivan v. State, 372 So.2d 938 (Fla. 1979)) or in this Court (see Sullivan v. Wainwright, 695 F.2d 1306, 1311 (11th Cir. 1983).

XIX

The Petitioner's nineteenth and final claim is that he was denied his right to

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*Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770 (1968).

due process under the Fifth Amendment; his right to effective assistance of counsel under the Sixth Amendment; and his right to regularity on the imposition of capital punishment under the eighth Amendment, all because the state courts never conducted an evidentiary hearing or hearings concerning his many claims other than the hearing held with respect to the claimed Brady violation. There is, however, no constitutional right to an evidentiary hearing when none is necessary to resolve the contentions advanced, i.e., when the claims asserted are fully capable of resolution by reference to, and reliance upon, the record already made in earlier judicial proceedings. Indeed, in most habeas cases that is the only appropriate manner of resolving the issues raised. Thus, in this instance, just as

this Court has been able to resolve the Petitioner's contentions by a review of the record and without further evidentiary hearing, so also were the state courts justified in proceeding in the same manner.

The Petition for a writ of habeas corpus is DENIED. The death warrant outstanding against the Petitioner having expired, the stay of execution granted by this Court on February 14, 1983, is MOOT and is therefore DISSOLVED.

The Clerk is directed to enter judgment dismissing the petition with prejudice.

IT IS SO ORDERED.

DONE AND ORDERED at Tampa, Florida, this 18th day of November, 1983.

[s]
UNITED STATES DISTRICT JUDGE

SUPREME COURT OF FLORIDA
STATE OF FLORIDA

DENNIS WAYNE SMITH,

Appellant,

VS.

STATE OF FLORIDA,

Appellee.

APPEAL CASE NO. 49,245
APPEAL VOLUME III

TRANSCRIPT OF RECORD ON
APPEAL FROM THE CIRCUIT COURT
OF POLK COUNTY, FLORIDA

HONORABLE OLIVER L. GREEN, JR.
PRESIDING JUDGE

ROBERT E. PYLE
145 East Haines Blvd.
Lake Alfred,
Florida 33850

ATTORNEY FOR
APPELLANT

OFFICE OF THE
ATTORNEY GENERAL
Capitol Building
Tallahassee,
Florida 32304

ATTORNEY FOR
APPELLEE

It's serious, sure, the defendant is on trial for his life; but the state did not create the circumstances that put him there. The state has only brought this charge to you to consider. The state did not create the circumstances, and I ask for your guilty verdict.

MR. HADDOCK: Ladies and gentlemen of the jury, this is indeed a time for trial for a lawyer in any case on either side, regardless of whether it's a criminal or civil case. In this particular type of case, the lawyer who is responsible for the outcome pretaining to the defendant has more responsibility than he will ever have at any time when he is practicing law. Again, I say to you, as has already been said, anything I say if it is in conflict with your recollection, if it is in error, it's an honest error.

If it helps you recall something that perhaps you were in error about -- because we're all human -- maybe we can straighten it out.

I do not feel the closing arguments as such are burdensome and are archaic as do many lawyers. I don't think it's a time, as it was when we were seating the jury, for visiting and for any type of humor. It's a time of great seriousness. It's the strongest thing we do. It behooves us to have, those of us who defend, to have our thoughts together. It is the highest point that there can be. If we do miss something, we hope that somehow we have skirted the issue so well that you will pick it up, good or bad. We are here for the truth, the ultimate turth, and I have explained my position. There is no need to dwell on that.

The Court is going to instruct you and you will, you will base your verdict on this thing. The Court is going to instruct you on reasonable doubt. If you find any reasonable doubt, anyone of you individually in your own minds that you do not resolve, then you cannot convict the defendant. You individually nor this jury collectively. That's the burden; that's your burden. It will soon be handed to you.

His Honor will read you because of the magnitude of this case a rather large volume of law. It behooves you to listen to him well because you will have to apply this law in coming to your ultimate conclusion as to the guilt or innocence of Dennis Wayne Smith in this case as he is charged with first degree murder of Mr. Arnsdorff by the method which you will

have as a result of the indictment returned.

During the course of my arguments, and I've done this for years and I think the courthouse personnel becomes a little tired of it but it is effective, I have behind me on this wall a large neon sign. It's red. I somehow control the switch in my discussion with you, but I can't see it because my back will be turned to it; and it spells reasonable doubt. Ladies and gentlemen of the jury, if at any time in your individual mind I turn that sign on, Dennis Wayne Smith is not guilty. Now, let's get away from the, "I turned it on." If the facts I convey to you turn it on or the facts that I recollect with you turn it on, Dennis Wayne Smith is not guilty. That's the promise you made; that's why we took so long in examining you. Not

nearly as long as we anticipated. This trial has gone much faster than we figured it would go, but you promised to use your mind to the best of your capacity to come to an ultimate conclusion of the guilt or innocence of this defendant based upon the facts which you will take into the courtroom and apply to the law which His Honor will give you.

It's that simple, and it's that complicated. Just as is my duty up here complicated, so will yours be when you retire to that jury room. I do not envy you; I would not trade places with you, because you have as I have already explained to you the greatest responsibility beginning to devolve on you that you will ever have in the upholding of the American way of life--to come to a fair and just conclusion pertaining to the guilt or innocence

of a man on trial for his life.

Now, this case could really be called a slot machine case, couldn't it? You have got several people involved; in a slot machine you have several rollers. Let's make it a quarter slot machine so it won't be real cheap and it won't be real wasteful. You put a quarter in it and you pull the handle. The only thing you are certain of, ladies and gentlemen, is that you might not get your money back or any other money. That's the truth in a slot machine, and we have a slot machine case. Now, right there, the idea that you might not get your money back is the beginning of a reasonable doubt. As you watch these things go and they fall in line if you get so many cherries you get maybe a jackpot; a bunch of lemons, you're out of business. I'm playing that game with you only it's

no game. It's for real. Like nothing you will ever find in a casino, nor is it like anything else you will ever run across in life as such except under these circumstances.

The burden of proof as indicated to you at the beginning of this trial is a tremendous responsibility; and it is on the state, because you agreed with me when we started this case that Mr. Smith was an innocent man. Now, our problem, which is yours because we are transferring it to you, is has this state carried that great burden on a first degree murder charge? Have they carried that burden beyond and to the exclusion of every reasonable doubt. That doesn't mean every doubt. His Honor is going to tell you what a reasonable doubt is and I'm not going to tresspass too much on his reading of the law

because there is too much of it as it is. There will be too much of everything; but you, you are the ones who are here, and you are the ones who will have to know and understand.

Now, in order to discuss this matter with you, and, ladies and gentlemen of the jury, let me explain this. Under our rules of procedure Mr. Smith took the stand and testified and was subject to cross-examination. He brought in witnesses; and I therefore will not be back before you, which means neither will Dennis Wayne Smith, bcause I'm speaking for him in his place as his counsel.

And I must go over with you in more detail than has been done previously concerning the witnesses that appeared in this case in order to refresh your minds, and I hope not to bore you. I can't

guarantee that this sort of thing isn't repetitious and boring, but it's somewhat necessary in order that we can do as has already -- feel as has already been mentioned to you when we go home. Oh, my goodness, I forgot one important point, and that one point might have tipped these scales on that reasonable doubt. So let me start with our witnesses and I will lace through this discussion personal things which I am allowed to say within reason.

Dr. Thorpe, my recollection, was the first witness. Obviously a competent dentist from Jacksonville, Florida. The last time he had seen the decedent was November 8, 1971. As a result of his testimony there was introuced into evidence, and you will have with you, small photographs which in truth and fact show the teeth in

practically the same size as the larger photograph ultimately introduced, but do not show them in the same fashion. That's all Dr. Thorpe had to give to us.

Then Dr. Cardman, who is a dentist here in town, gave us the information that he made an X-ray examination of a rather--and we use this word because it's a good word--he made an examination of a rather exotic type. He did not do as would normally be done, and at least he did not testify that it would normally be done, and took the photograph of the mouth from a rather odd angle that would show all the teeth whereas this shows individual sections of the teeth. You will have an opportunity to study this. It will be part of the evidence which I assume will go into the courtroom--into the jury room with you. You be sure, you be sure, because

that's it. Without an identification of Mr. Arnsdorff we have no, we have no crime.

These pictures are weather reports. I don't know what they show. I don't see any point in their being introduced, but if you want to see a certain portion of Polk County from the area and places marked out, that's fine. They were marked out and shown to you for whatever value they have. And frequently the Court is caught in a bind, so are the attorneys, in feeling that matters should go to the jury when they really don't have any business there; they are just that much extra.

We get to Dr. Holoman, who was the medical examiner, a medical examiner of the county. He is one of your employees. There has been pretty bad testimony about the circumstances surrounding the murder

of Arnsdorff. Icepick, jabbing with tire irons. The only thing he says is that the man died from a suffocation in his trachea down into his bronchial tubes. I don't feel it's my duty to prove the state's case and I don't know what medical examiners do. Nor do I know what can be done, but it was not said negatively that there were no marks found on the decedent that indicated that he had been hit or struck with either an icepick in the bones or in the chest cavity anywhere. There was no evidence of that, albeit he had been badly burned in that automobile. There is no question about that. But there was no testimony from Dr. Holoman, and I wonder if there is no technique that can be used. I have wondered through this entire trial, gentlemen, ladies and gentlemen, about the rather lax techniques in the lacing up,

the fast lacing up we have had to do--or that the state has had to do--to get this thing put together, if it is put together. And if they do, by their loopholes and openings and gaps like this, leave in your minds some reasonable doubt.

Now, Lieutenant Keeney testified only that there was a cause--he had something to do with the body as such and he was out of town. We did not need him. They read his testimony and it was agreed to by both the state and myself since he was going to a very important conference for police officers, that he should go and not be kept here. His testimony was not that important. You have heard it. You will give it whatever value it's worth.

Now, I will talk about some other people and we will come back to the man that apparently has been said to be on

trial here, because he is on trial here a little bit. He is on trial about as much as anybody ever saw, and we are going to put some pieces together about him if we can.

Mr. Toney testified only that he was a paper route man, he saw the fire burning, he saw a corpse in the trunk. This is conclusive testimony and unrebutted.

Deputy Wood, who is also somewhat of a weather report type situation, said that he went out to Lake Luther Road and saw the burning skull; and Sergeant Boydston and Lieutenant Keeney, Al Lang and Mr. Toney all came out, and the photographic section of the Sheriff's Department began to function and do its duty as it should have done in regard to this matter.

Sergeant Charles Duke, who has had a good bit of experience in police work,

poured these plaster casts. He said that he had taken a lot of photographs. He took the photographs of the area and he took the plaster casts. They are in evidence; we will get back to them and talk about them. There is no argument with his work. Some argument with the necessity of all the pictures, but they are there and if you want to look at all of them they are there. He showed just about everything that can be shown.

Now, we had out shoes question situation that was after the, after the alleged crime; the shoes were taken for identification voluntarily given by--they didn't have to snatch them off him or anything. He gave them to them for identifying the defendant, Dennis Wayne Smith. And Sergeant Al Lang then made a print, he said, out at the place of these tennis shoes. He could not find an adequate--or place in

this area that sold that type of shoe; so they took the evidence to the FBI, the evidence being apparently only the tennis shoe print made out of a plaster of Paris cast. The cast of the tire was then physically taken to the FBI, and also the tire. So far as we know that's all they took up there. They searched the car of the defendant. Some question was as to whether the search was properly administered, but that's a legal question, not one that concerns you.

I want to talk about the FBI agent, Mr. Hegvold, a little bit. He testified he had a bachelor of science degree and also a master of science degree from George Washington University, which as most of you know is a great university within the City of Washington. Apparently been an FBI agent for many years. He

examined the evidence; he said he had examined evidence in hundreds of instances on both tires and shoes. Now, the tire --I'm not going to bring the tire over if I can see the markings on it. That's what they took up. they have identified this and I say to you, ladies and gentlemen, so what? This tire is obviously, I mean this cast is obviously according to that expert testimony the cast from a portion of this tire. I think he pretty well botched it up, and it makes me a little worried about him when he says the tire was in the same position when this mark was made that it's in now when you and I--you're a jury or you're the one who discerns the fact. You know that a tire lying flat on the surface is spread out and under that tread is wider. There was nobody's attempt to fit this tread into that tire as it presently

sits. There was no attempt made. I certainly am not going to make one, but you will have the opportunity to. It really doesn't make any difference about this. We will consent and concede that this is from that tire, but I want you to know that the continuity of sloppiness goes right on up to the FBI in the presentation of this case because that man did not give good FBI testimony. And I think you folks know that he did not give good FBI testimony. When I can wind up with a law book in a country courtroom like this on top of a tire that's covers only about three-quarters of an inch, then he starts talking to me about being a spread in the tread, of course, and he assumed the car had been moved and all that kind of hot-shot I don't know. You are expected to take that as the greatest expert we had.

We wonder, we wonder if Mr. Hoover, with all his disadvantages and all of his wrong things, wouldn't have sent this man out to Quantico for some other purpose besides testifying in Court.

I don't know how the FBI is working these days. I know how this FBI agent is working these days, but he could not identify this as being the exact shoe. Reasonable doubt? Do you think this is the only pair of these shoes made? It's an eleven, not a big size , not an overly big size. Somebody identified that; I doubt that he knew. He didn't know what make they were, and it says P.S. on the back, for crying out loud, whatever that means in the way of the make. Did this man have the Monday morning blues, or what was his trouble when he was doing his identification work and how much credance and value

can you give this type of evidence as such?

Let's talk about these shoes a little bit. The defendant testified that they were in his automobile and that he lent the automobile to Johnson. You know, we are not pumping up wild stories here. We are talking about some wild things that happened, but is it possible that with these shoes and his automobile that this little Johnson could have worn them during the perpetration of whatever happened here in order to implicate Smith in what has certainly happened? Reasonable doubt? A question in your mind about that, or is it completely clear in your mind that because that man who didn't even know the name of these shoes said that it was possible that they could have been worn by him? Or at least possible that it was the same shoe.

He never did say they could be worn by him, just said it was possible that it was the same shoe; and we have connected testimony that the shoe came from Mr. Smith, so there is no question about that.

Reasonable doubt, reasonable doubt. Life, electric chair. We are not making any deals. We had no deal. You make the deal for us based on that kind of testimony from the finest people in the world, the Federal Bureau of Investigation. Maybe instead of, well, I have traversed too far afield.

I think it's proper for me to say of all the testimony given, and much of it has been very irritating, that personally to me was the most irritating and the most disappointing because it came from such a reknown source as the Federal Bureau of Investigation.

Reasonable doubt.

Now, we get into this situation here, gentlemen, I want to tell you this--ladies and gentlemen. I get in trouble with this; I don't now, for crying out loud, I just ought to say persons, then we would be better off, but I, I just don't know what to think about the Green Parrot. We had some people come in here and talk about it and it appears that the three things in the Arnsdorff case are Lurch, and you have seen him walking in and out of here enough to know how big he is; and a great deal can be made about the fact everybody saw Lurch. Well, everybody is going to see Lurch as long as he lives because he is a big man and particularly if he has a floppy hat on. Whether he has a hat on or not, you're going to see him. You've looked at him; look at him. You

know what he is; he is in evidence; he is your prime piece of evidence. You have looked at him, listened to him, watched him, noticed him throughout this trial. I have seen you doing it; that's your job, and I'm glad you were doing it.

We have in this case the Green Parrot, a white Cadillac and a pair of tennis shoes and a bunch of people that saw Lurch. But nobody but one person has come in here and put Lurch where he shouldn't, shouldn't be by direct testimony. The rest of it has been by indirect testimony based upon findings of detectives and such great and wonderful people as this FBI agent.

I, you know, these fellows that went in there, you saw them, you are all grown people. You know what I'm talking about. I don't know whether we're going to fall

as Rome did or whether we are going to live, but I can't make comments about these people. They are really not material. Their personalities are not too material to this case except that all they have done through the case is talk about queers so that lets me talk about them a little bit. One of their material witnesses is a man who has elected over a period of his life to make his money running a gay bar. And you are asked to believe his testimony and take as a great and wonderful thing in our American culture. We had a parade of men in here, none of whom could lower their voices below a falsetto almost, testifying that they saw Arnsdorff at the Green Parrot. So what? Nobody denied he was at the Green Parrot He didn't deny it; the state hasn't denied it. There was no denial that he was at the Green

Parrot or that he shot pool at the Green Parrot with Arnsdorff. Weather reports, weather reports.

Now, let's go back to something that is not a weather report. Let's talk a little bit about the man, Wesley Irvin Johnson. Then we will talk about the sign. Watch that sign while we are talking about him and his testimony.

Well acquainted with Smith, Lurch, Slick. And let me tell you what he has done. He has entered a nole contendere plea which means he has made no contest plea--this is by his own testimony---with the Court for multiple murders and he has not yet, ladies and gentlemen, been sentenced. He has made what is known as a deal, but the deal hasn't been closed. What's the consideration for the contract he made? It's to testify against the

defendant here. That's the way we are runing this trial. Without Wesley Irvin Johnson we wouldn't be here. Without his testimony we wouldn't be here. There wouldn't be any trial. There wouldn't be sufficient evidence to have stayed in this courtroom without his testimony. So what does he get out of it? He has told you he is going to get 25 years; the state has mentioned 25 years. He has no guarantee that he will get out. Reasonable doubt come in your mind when you get to the idea of a man--and you saw his personality, a weak personality, little man under the duress he is obvioiusly under from a strong personalitied wife, and the strength exhibited by the police force here. I'm glad they are strong and exhibit strength, but they overwhelm you; and he comes into this great courtroom and the majesty of the law

gives him a deal. "Are you going to tell us about Lurch?" And he does and he does not go to the electric chair. He has not got any chance of going unless he changes his testimony. This is conjecture, but is it within the realm of reasonable doubt? Is it, gentlemen? Ladies?

I don't think we need to go through the sordid affairs involved in what they planned to do at the Green Parrot. This business of rolling queers, it would appear to me after this case a man who is a homosexual is in extreme danger in this county. He should be given special protection. Whatever we think of him, he should be given special protection. But that's what it was all about. And we told you, the state and the Court and myself told you that the facts weren't going to be nice. They haven't been. They won't

get any worse, but they won't get any better. We certainly can't say that, that the defendant has been a model citizen. But can you possibly fit in the fact that what he said was true, what Mr. Smith said was true about going home to bed and lending his car to Johnson? With the background he gave you of having been involved in a narcotic alcoholic binge for a good length of time prior to this happening, can you fit that in? Does that ring that sign back there, or is it absolutely inconceivable to you that he could have gone home and gone to bed?

They testified to the consumption of an astronomical amount of alcoholic beverages during that day. Does it not fit just a well on one foot as it does on the other? That Mr. Smith went home sick, drunk, narced up, with balls running

around in front of his eyes when he shot pool? Does that not fit just as well as this little Wesley Irvin Johnson saying that Smith was with them and did all these horrible things? He is the only one that said this, you understand.

The only thing we have is a shoe print out there from the man who can't look on the back of the shoe and tell me the name of it. That's all we have got that gets him out there. That car being there, noting else was there, no finger-prints introduced, nothing introduced to show that Dennis Wayne Smith was at the scene of the crime. Do you realize that? We are dealing in a car which he said he lent to Johnson and we are dealing in a heelprint and a lot of other mess which we will get to and go over.

Is it possible that Johnson, in his

great fright, fabricated this story? Is it any way possible that he fabricated this story about Smith? He was frightened, testified to that. He came back here apparently over his wife's objection. His wife is a great deal older than he is on a comparitive basis in age. She exerts some influence over him, but he was apparently a young man who floated around a lot; he testified that he did. He was in Daytona, I assume because you are members of a jury that some of you know what is in Daytona. He was in and out of Daytona and Lakeland in the Green Parrot and associating with Smith. He slept where he could find a bed. Is it possible that he took that white Cadillac and he and the other man went out and killed Arnsdorff, burned him, they went out and he killed the other man? Is that possible? Or is it absolutely

necessary that Smith be there? Was there any situation where it took three instead of two?

I'm pulling that handle harder, ladies and gentlemen, that slot machine is running around. Do you know where it's going to stop for sure? Do you know whether we are going to come up with lemons or oranges or cherries or whether we are going to hit the jackpot? Do you think anybody knows? The whole crowd testified they had been drinking so much they didn't know what was going on.

Smith has been in jail for months. It has been testified that he is in a completely different physical condition than he was in when he first came in jail. His looks are different; he has put on 20 pounds. He is a different man. Could he sit down before you yesterday as he did

and testify and testify truthfully.

You see, there is no question about it, and let's get this straight. A terrible thing to say, Dennis Wayne Smith is here today because he has no alternative but life imprisonment or the electric chair. No deals have been made with him. So who has the better, better opportunity? Who should lie? Wesley Irvin Johnson? Or Dennis Wayne Smith?

All right, let's carry this one step further. It behooves both of them to lie, how do you like that? It behooves both of them to lie. That's a terrific thing to dump in your lap, and you are going to have to decide who was lying about what and when, if there was lying on the part of anybody, and it had to be because they remember completely divergent stories. Somebody was telling a lie and a bunch of

them. Was it Johnson, who has this in limbo deal with the state, or was it Dennis Wayne Smith, who knows what he is facing, who sat down in front of you yesterday and with much more, much more containment and much more composure than I ever thought he could gather told you as straight a story as he could.

We had some rebuttal testimony, we had two men come in and say they heard Wesley Johnson say he had committed all the crimes. Wesley on the stand said, "Well, I did, then I didn't, I got nervous," and everything. He was worried about getting an icepick in him. I don't know whether he is worried about getting an icepick in him or worried about getting strapped in a chair. He is worried, anyhow. I will concede he has something to worry about, but he stuck to his story. He

elected to do that. And there was introduced into evidence and you will have it with you a statement from him, there was a note from Wesley Irvin Johnson which said, "Play it cool, don't worry, everything is going to be all right. The chair has come back, I hope I don't get it." Do you remember admitting that he wrote that note? Don't forget that. Don't forget that. You have a man who was flipping a coin; half the time he is on one side, half the time he is on the other side. You are going to think I'm a compulsive gambler if I keep talking about slot machines and flipping coins, but that's the sort of situation we are into today.

That note is very, very important that you do remember that note. It was admittedly signed by him, admittedly sent to the defendant, and received by him.

The state had knowledge of it and we had knowledge of it.

The testimony this morning, by the way of rebuttal, you can take it for what it was worth. It was a little bit more lacing up. I think it was necessary lacing up on the part of the state because there was some things left open. They brought in Mrs. Johnson, who stated that her husband was frightened by this situation. Ladies and gentlemen, I submit to you, wouldn't he have been just as frightened by this situation if Dennis Wayne Smith wasn't involved as he would have been if he had not been involved? Can't it go either way? Isn't what happened out there that was described by Johnson enough to frighten any man without anybody else being involved with him who is still alive, isn't that true? So is her

testimony worth anything? She was very loose about where he is when he is, what he is doing. Can you take her testimony beyond and to the exclusion of a reasonable doubt that he was away from homne on the night of this incident, that he didn't stay in some house somewhere just as the defendant said he did?

She hasn't had a very good life. I don't know what she is going to get with a husband who is in this kind of trouble and she has two children by another man. It really doesn't behoove her to tell any lies. I don't think she did; I just don't think she knew anything. I don't think what she said had anything to really add to or take away from the situation.

They brought in Dr. Niswonger, who testified that Dennis at the time he interviewed him didn't, didn't recall.

Well, is it within the realm of possibility, and you can conjecture on this some since you had medical testimony. Isn't it in the realm of possiblity that Dennis was about to a stage at that time that he didn't want to recall anything? It's not at all unfair to Dennis for you to think that there have been times when he didn't tell the truth. His Honor is going to charge you on that. We are not dealing with a bunch of people whose bench mark is the truth and veracity. We are dealing with a group of people who have lived in the strata of society that few of us know. It is an unfortunate strata of society, but it has to do with the misrepresentation of life or a hiding from life, as he candidly told you.

I've forgotten what he said, he said he was going to change his act. Not a bad

phrase, he was going to change his act or he did change his act. I can assure you he did, because he could no longer get narcotics or whiskey and that will help you to change your act, all right. This is what has happened to Dennis Wayne Smith.

Now, there are many more things that I could bring out to you. I am not unaware of certain time elements involved and attention spans. I'm also not unaware of the fact that we are both in a place where we don't want anything left unsaid, but I'm, practically through saying my say.

I want to thank you for your kind attention on behalf of my client. Not carrying favor with a jury,--I would kick off, or ask the judge to if you hadn't given your kind attention to this case, you can be assured of that--but this has been an

attentive jury.

I do not pass upon the guilt or innocence of Dennis Wayne Smith. You do. Each one of you men told me when you took this seat upon this jury that you understood that nowhere except on a field of battle would you ever in this county in the name of this county would ever have a greater responsibility than you have sitting on this jury. And you ladies, as mothers, know what I'm talking about. You have undertaken this voluntarily because there is not a one of you that had to sit here. The Judge would not have forced it. I urge upon you that you not forget your vows and your oath given--and the one oath you took, because there were many, because both the state and defense elicited from you many promises. You remember those promises when you go back in the jury

room. You remember that the main thing here is Dennis Wayne Smith and what his future is. The question of guilt or innocence. The question of a white Cadillac, one tennis shoe, a pool game with a deviate in a beer joint that catered to them. The testimony of a man who is in serious trouble, Wesley Irvin Johnson. That fundamentally is your case, ladies and gentlemen.

If there is anything in this case as I presented it to you or as it will be presented further by the state in rebuttal or has already been presented to you or comes to your mind individually--because that's the most important thing is your mind, not mine. I am not pumping your mind; I'm refreshing it. If anything comes to you that raises a reasonable doubt, this man should not and cannot, if

you are honest with yourselves, be convicted.

Thank you.

EDITOR'S NOTE

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

NO. 84-1047

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections, State of Florida,

Petitioner,

vs.

DENNIS WAYNE SMITH,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT ON JURISDICTION

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QUESTIONS FOR REVIEW

I. Where no "reasonable trial strategy" appears from the face of the record to explain trial counsel's failure to use prior inconsistent statements in impeaching the testimony of the State's critical witnesses, does the Circuit Court of Appeals' remand for an evidentiary hearing on the issue create conflict with the standards for judging an ineffectiveness of counsel claim emunciated in Strickland v. Washington, ___ U.S. ___, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)?

II. Assuming trial counsel's performance is in fact deficient, is the Strickland "prejudice" standard met by a showing that the evidence which counsel failed to use consisted of the earliest record statements to the police by the crucial witnesses against respondent, in which the witnesses failed to make any mention whatsoever of Respondent's participation in the offense?

III. In shaping a pragmatic remedy to avoid a patent injustice to Respondent if a certain unique factual finding should be made by the District Court on remand for evidentiary hearing, does the Circuit Court of Appeals fail to give proper weight to the "presumption of correctness" normally given to a State court hearing?

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JURISDICTION

Respondent accepts Petitioner's statement of jurisdiction as being essentially correct, except insofar as the Eleventh Circuit Court of Appeals, by its own terms, did not "reverse" the federal District Court's denial of Respondent's petition for a writ of habeas corpus, but rather affirmed in part, vacated in part, and remanded for evidentiary hearing on certain specific claims. See A 3 and A 61,* Eleventh Circuit opinion.

STATEMENT OF THE CASE

In its Petition, the State accurately summarizes the factual background of the offense involved in this case. However, the State has omitted relevant facts concerning the issue at hand: Respondent Smith's claim of ineffectiveness of counsel. Smith, therefore, is impelled to supplement the State's summary.

The sole evidentiary hearing held in this cause during any post-trial proceedings involved specific police reports and transcripts wherein the very first contacts of co-perpetrator Wesley Johnson and his wife, Patricia Johnson, with law enforcement personnel were recorded. The police reports and transcripts include:

a. Offense Report (Homicide), Daytona Beach Police, dated (inside) 9/6/75 (Respondent's Exhibit K to Petition for Writ of Habeas Corpus), RA 1-9; [summarizes very first contacts of both Wesley and Patricia Johnson with police authorities in connection with the subject homicide, wherein no mention is made of Respondent Smith].

b. Sheriff's Office, Polk County, Supplementary Report, writer: Chuck Keeney, Sept. 6-10, 1975 and Aug. 15, 1975 (Respondent's Exhibit E to Petition for Writ of Habeas Corpus), RA 10-18; [summarizes Keeney's contacts with both the Johnsons].

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*The reference "A __" refers to the State's appendix; the reference "RA __" refers to Respondent's appendix.

c. Transcript, 9/6/75, of statement of Wesley Johnson to Polk County police officers (Respondent's Exhibit Q to Petition for Writ of Habeas Corpus), RA 19-44; [wherein no reference is made to Respondent Smith in connection with the subject homicide].

d. Transcript, 9/8/75, of statement of Patricia Johnson to Polk County police officers (sent to Eleventh Circuit Court of Appeals on 6/26/84, after oral argument and pursuant to request by the Court), RA 45-50; [wherein no detail of the subject homicide is provided].

e. Transcript of telephone conversation between Patricia Johnson and Polk County police officers, undated, RA 51-53.[1]

The sole issue at the state evidentiary hearing was whether these various police reports and transcripts were provided to Smith or to his attorney in accordance with the requirements of Brady v. Maryland, 373 U.S. 83 (1963); none of the reports or transcripts had been used by Smith's attorney during the trial to impeach the testimony of either Wesley or Patricia Johnson.

After the Brady hearing, the state trial court ruled that the documents in question had been available to trial counsel; trial counsel did not testify at that hearing.

The claim on which the Eleventh Circuit has remanded the case to the District Court for evidentiary hearing relates to trial counsel's ineffectiveness specifically in terms of his failure to use any of the stated documents for impeaching one or both witnesses.

The Florida Supreme Court, the federal District Court, and the Eleventh Circuit have all stated in various opinions that Wesley Johnson's testimony, as buttressed by that of his wife, was the critical testimony against Respondent Smith, there being a paucity of any other evidence on which to convict Smith. (See for example, the Eleventh Circuit opinion at A 28.)

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[1] The Eleventh Circuit notes at A 17 that even now, the record is not completely clear as to all the pretrial statements made by Wesley and Patricia Johnson to police authorities, and suggests that the District Court may need to expand the record with reference to such statements.

SUMMARY OF ARGUMENT

I. The State seeks certiorari on the ground that the Eleventh Circuit opinion conflicts with this Court's decision in Strickland v. Washington, ___ U. S. ___, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). However, a comparison of the latter case with this case reveals that, whereas a reasonable trial strategy for trial counsel's decisions can be gleaned from the face of the record in Strickland, no such strategy can be found in the instant record. The Eleventh Circuit opinion does not hold that such "strategy" is inconceivable; it holds merely that an evidentiary hearing will be necessary to determine if counsel had any such strategy, and therefore the case has been remanded to the District Court for a hearing on Respondent's ineffectiveness of counsel claim. There is no conflict between Strickland and this case.

II. The State argues that, even if counsel's failure to use certain impeachment evidence available to him against the State's pivotal witnesses was a deficiency, nonetheless no prejudice resulted to the defense therefrom under the Strickland test. However, where all previous court opinions have stated that the testimony of the witnesses in question was the State's whole case, and where the unused prior inconsistent statements were the earliest public testimony of the witnesses and were surrounded by an aura of solemnity because made to the police, the test -- that is, that there is a "reasonable probability" that the fact finder would have had a "reasonable doubt respecting guilt" had the statements been used for impeachment -- is met.

III. Because any exploration of trial counsel's failure to use the prior inconsistent statements for impeachment of the State's central witnesses must of necessity involve the question of whether counsel had the statements in question, the Circuit Court opinion suggests that the District Court may have to revisit the Brady issue, despite a previous state court evidentiary hearing on that claim. The State's argument that this violates 28 U. S. C. §2254(d) fails to acknowledge the potential injustice to Respondent if the District Court should rule against his claim of ineffectiveness because, factually, trial counsel never had the documents. The only reason for the Circuit Court to permit reopening of this question is an effort to prevent Respondent from being executed solely as a result of this "Catch 22." In this unique fact situation, the Circuit Court is merely following the underlying dictates of the habeas corpus philosophy, which is to assure that justice has been done.

ARGUMENT IN OPPOSITION TO GRANTING THE WRIT

I

WHERE NO "REASONABLE TRIAL STRATEGY" APPEARS FROM THE FACE OF THE RECORD TO EXPLAIN TRIAL COUNSEL'S FAILURE TO USE PRIOR INCONSISTENT STATEMENTS IN IMPEACHING THE TESTIMONY OF THE STATE'S CRITICAL WITNESSES, THE CIRCUIT COURT OF APPEALS' REMAND FOR AN EVIDENTIARY HEARING ON THE ISSUE DOES NOT CREATE CONFLICT WITH THE STANDARDS FOR JUDGING AN INEFFECTIVENESS OF COUNSEL CLAIM ENUNCIATED IN STRICKLAND V. WASHINGTON, ___ U.S. ___, 104 S.CT. 2052, 80 L.ED.2D 674 (1984).

The State urges this Court to grant certiorari on the ground that the Eleventh Circuit opinion conflicts with Strickland v. Washington,[2] ___ U.S. ___, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). There is, however, no such conflict.

In Strickland v. Washington, supra, this Court framed a two-prong test for determining ineffectiveness of counsel claims: briefly, the defendant must show both that counsel's performance was deficient and that the deficiency prejudiced the defense.

With reference to the first part of this test, this Court stated:

> Counsel...has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process...In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Strickland v. Washington, supra, 104 S.Ct. at 2065, 80 L.Ed.2d at 694 (emphasis added).

Continuing, this Court further stressed the need for looking at the context in which trial counsel was operating at the time of trial:

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Strickland v. Washington, supra, 104 S.Ct. at 2065, 80 L.Ed.2d at 694 (emphasis added).

The Strickland case involved a duty to investigate in connection with the

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[2] The State miscites this case; there is no Strickland v. Wainwright. The correct and complete cite is provided herein.

presentation of mitigating factors during the penalty phase of a capital case. As this Court observed, there were numerous sound strategic reasons for trial counsel's decision not to present certain evidence to the trial court -- and these reasons were patently apparent on the face of the record.[3]

The case here in question is very different. The State argues that trial counsel made a calculated decision not to use the prior inconsistent statements of either Wesley or Patricia Johnson, because he chose to attack credibility in the one instance by impugning motive (Wesley's plea bargain) and in the other by attacking character (Patricia's criminal record).

The State's argument, however, is totally unsupportable. If we recognize -- as we must from the face of the Record -- that Wesley Johnson's testimony constituted "the entire case of the State," see Eleventh Circuit opinion at A 28, then we would normally expect experienced effective trial counsel to use every tool at his disposal to destroy that testimony. As the Eleventh Circuit correctly points out (at A 28), there would be nothing inconsistent about trying to impeach by both an attack on Johnson's motive for testifying and an attack by way of prior inconsistent statements.

More importantly, the State's suggestion that trial counsel chose to rely on the plea bargain is belied by the Record. Under Fla. R. Crim. Proc. 3.250 (which has been in effect either by rule or statute since 1853, Huerta, The Last Word in Closing Arguments, 57 Fla. B. J. 334 [1983]) and interpretive case law, a defendant who puts on no testimony other than his own has the right at final argument to open and close to the jury -- a right characterized by the Florida courts an an "important," Cagnina v. State, 175 So.2d 577, 578 (3 DCA, Fla. 1965), "valuable," Carter v. State, 101 So.2d 911, 914 (1 DCA, Fla. 1958), and "substantial," Preston v. State, 260 So.2d 501, 504 (Fla. 1972), procedural right, the denial of which has repeatedly been held to constitute reversible error. See, e.g., Birge v. State, 92 So.2d 819 (Fla. 1957). Trial counsel,

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[3]Note that in Strickland, an evidentiary hearing on ineffectiveness of counsel was in fact held, although this Court observed that such a hearing on the facts of that case was not necessary. Strickland v. Washington, supra, 104 S. Ct. at 2071, 80 L. Ed. 2d at 701-2.

by putting on the testimony of witness Parks, waived that valuable right for a piece of jailhouse gossip. And Parks' testimony was used solely to recite his overhearing of "prior inconsistent statements" by Wesley Johnson.[4] Had counsel used Johnson's own inconsistent statements to the police for impeachment purposes, he would have been able to retain this important right to open and close. No "trial strategy" is apparent from this decision by trial counsel.

Turning to the testimony of Patricia Johnson, it is again apparent that no inconsistency would have manifest itself had trial counsel attacked her credibility, both by her prior criminal record and by her prior inconsistent statements to the police about the homicide in question.

In connection with the police statements of both Wesley and Patricia Johnson, furthermore, there are inconsistencies about detail which could and should have been exploited by Respondent Smith's trial counsel (see Eleventh Circuit opinion, f.n. 9 at A 29). Any trial lawyer knows that consistent detail, especially when repeated by more than one witness (as was the case here, when both Johnsons recited similar minutiae) gains credibility for the witness, while inconsistencies as to detail plant doubts in the minds of the jurors. In fact, the assistant state attorney argued in closing argument at trial that the consistency on details between Wesley's and Patricia Johnson's testimony suggested that their story was indeed truthful. RA 54. The variations among the different pretrial statements in question and between them and trial testimony -- none of which were used by trial counsel -- further supports Respondent's claim of ineffectiveness.

The Eleventh Circuit opinion holds only that the present state of the record, absent an evidentiary hearing, does not allow it to conclude that there were valid strategic reasons for trial counsel's failure to use the statements to law enforcement authorities made by both of the Johnsons. In fact, the Eleventh Circuit invites the State, on remand, to introduce evidence at the

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[4] In cross-examination, trial counsel also used a prison note written by Wesley Johnson, another "prior inconsistent statement."

hearing showing that counsel's failure was indeed "prompted by reasonable trial strategy." Eleventh Circuit opinion, A 34.

On the facts of the case herein, there is in sum no conflict with the standards set forth by this Court in Strickland v. Washington, supra. The cases differ in that the earlier case permitted an extrapolation of "reasonable trial strategy" on the part of counsel from the record, and this case requires a remand for an evidentiary hearing to enable the reviewing Court to determine if there was a "reasonable trial strategy" -- because, on the face of the record, no such strategy appears.

It should be noted that, for this Court to grant certiorari in the present case at the present time would probably be both premature and inadvisable. No finding has yet been entered by the Eleventh Circuit that Respondent's claim of ineffectiveness of counsel is valid; rather, the Circuit Court has determined that it can make no finding on that claim one way or the other without an evidentiary record on the issue. The case is therefore not "ripe" for this Court's review.

Secondly, the standards outlined by this Court only a short time ago in Strickland v. Washington, supra, are flexible ones. As Justice Brennan pointed out in his separate opinion in that case:

> I join the Court's opinion because I believe that the standards it sets out today will both provide helpful guidance to courts considering claims of actual ineffectiveness of counsel and also permit those courts to continue their efforts to achieve progressive development of this area of the law...[T]hose courts may continue to develop governing principles on a case-by-case basis in the common law tradition, as they have in the past. Strickland v. Washington, supra, 104 S.Ct. at 2072-3, 80 L.Ed.2d at 703.

The standards enunciated in Strickland v. Washington, supra, must percolate through the federal system for a while, to enable the lower courts to flesh out their substantive content in a meaningful way, applying the tests to a whole panoply of cases, before this Court should undertake any further restatement or refinement of the standards themselves.

II

ASSUMING TRIAL COUNSEL'S PERFORMANCE IS IN FACT DEFICIENT, THE STRICKLAND "PREJUDICE" STANDARD IS MET BY A SHOWING THAT THE EVIDENCE WHICH COUNSEL FAILED TO USE CONSISTED OF THE EARLIEST RECORD STATEMENTS TO THE POLICE BY THE CRUCIAL WITNESSES AGAINST RESPONDENT, IN WHICH THE WITNESSES FAILED TO MAKE ANY MENTION WHATSOEVER OF RESPONDENT'S PARTICIPATION IN THE OFFENSE.

Turning to the "prejudice" prong of the test for measuring ineffectiveness of counsel set out in Strickland v. Washington, ___ U.S. __, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), Respondent Smith would suggest that in fact his case clearly meets that test.

In discussing the "prejudice" requirement, this Court pointed out:

> [W]e believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome of the case....[Rather,] the defendant must show that there is a reasonable probability that, but for counsel's unprofessional error, the result would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland v. Washington, supra, 104 S.Ct. at 2068, 80 L.Ed.2d at 697-8 (emphasis added).

This Court amplified further:

> When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt...Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture. Strickland v. Washington, supra, 104 S.Ct. at 2069, 80 L.Ed.2d 698-9.

In applying the above standard, it is imperative analytically here first to examine the nature of the evidence which trial counsel failed to use, and second to look at the overall trial for the context in which such failure occurred.

The "prior inconsistent statements" included either verbatim transcripts or summaries of conversations between one of the Johnsons and law enforcement personnel in which neither of the Johnsons made any mention whatsoever of Respondent Smith. The average juror is likely to invest such conversations with a solemnity similar to that invoked by the oath -- as a general rule, one simply does not lie to police officers. In addition, these conversations are

the earliest recorded evidence of what the Johnsons told anyone publicly, apparently, concerning the homicide about which they later testified at Respondent's trial. Both because of their being early statements and because of their having been made to the authorities, these particular prior inconsistent statements made by the Johnsons would have carried substantial weight with a jury of laymen -- certainly, in the case of Wesley Johnson, far more weight than either a scribbled "confession" note given in prison to co-inmate Respondent Smith, or overheard jailhouse conversation between inmates.

In addition, the Eleventh Circuit, in discussing the prejudice aspect, refers to the fact (noted earlier in this Brief) that the State's entire case rested on Wesley Johnson's testimony, as supported by that of his wife. See opinion at A 28. The jury's decision as to Smith's guilt or innocence, in other words, turned entirely on whether they believed Wesley Johnson's testimony. To suggest that there is no reasonable probability that a reasonable doubt could have arisen in the minds of the jurors had they heard that the Johnsons' very first statements to the police made no reference whatsoever to Respondent Smith is patently absurd. Thus, in terms of the prejudice standard set forth in Strickland v. Washington, supra, the Eleventh Circuit opinion is completely in accord with this Court's decision -- there is no conflict which warrants the granting of the State's Petition for Certiorari.

III

IN SHAPING A PRAGMATIC REMEDY TO AVOID A PATENT INJUSTICE TO RESPONDENT IF A CERTAIN UNIQUE FACTUAL FINDING SHOULD BE MADE BY THE DISTRICT COURT ON REMAND FOR EVIDENTIARY HEARING, THE CIRCUIT COURT OF APPEALS DOES NOT FAIL TO GIVE PROPER WEIGHT TO THE "PRESUMPTION OF CORRECTNESS" NORMALLY GIVEN TO A STATE COURT HEARING.

The State complains that, as part of its remand of this case back to the District Court for an evidentiary hearing, the Eleventh Circuit is also allowing the District Court to reopen an issue which was the subject of a "full and fair hearing" in the state courts -- to wit, did trial counsel receive or have access to the various police reports and transcripts which he did not use in impeaching either of the Johnsons? The State claims that, by permitting the District Court to reexamine this issue, the Eleventh Circuit opinion is in conflict with several prior decisions of this Court, specifically Townsend v. Sain, 372 U.S. 293 (1963) and Sumner v. Mata, 449 U.S. 539 (1981) as well as with the statutory directive contained in 28 U.S.C. §2254(d).

However, in dealing with the so-called Brady issue, the Eleventh Circuit is merely fashioning a pragmatic solution to a very difficult and unique problem which arises in this case.

The Circuit Court specifically states that it is not passing on the question of whether the state court hearing which considered the Brady claim was "full and fair." A 36. Rather, the Circuit Court is attempting to avoid a potential "trap" for the Respondent which would result in a serious injustice: if the District Court on remand determines that trial counsel did not use the Johnsons' prior inconsistent statements because he did not have them, then trial counsel clearly was not "ineffective" -- but that factual finding (that he did not have the documents) would be in conflict with the state court's factual finding to the contrary. Unless the District Court has the freedom to revisit the Brady factual conclusions, then:

> Smith will be confronted with a variation of Catch-22 created in part by 28 U.S.C. §2254(d). The State could

> presumably argue that the state court's finding that the statements were available is a historical fact entitled to a presumption of correctness, but that counsel rendered effective assistance under the circumstances because the statements were, in fact, unavailable. Eleventh Circuit opinion, A 37.

To prevent the State from being able to exploit this manifest injustice to Respondent, the Eleventh Circuit virtually directs the District Court to issue the writ under Brady v. Maryland, 373 U.S. 83 (1963), if this scenario eventuates.

Because it is limited to the unique facts presented by this case, the Circuit Court opinion in no way "conflicts" with prior decisions of this Court vis a vis the presumption of correctness normally afforded state court proceedings.

CONCLUSION

For the above-stated reasons, Respondent Smith respectfully urges this Court to deny certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a copy of the foregoing has been furnished by regular U. S. Mail to counsel for Petitioner, Assistant Attorney General Theda James Davis, Park Trammell Guilding - Room 804, 1313 Tampa Street, Tampa, Florida 33602, this 28th day of January, 1985.

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Attorneys for Respondent

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

NO. 84-1047

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections, State of Florida,

Petitioner,

vs.

DENNIS WAYNE SMITH,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S APPENDIX TO BRIEF OF RESPONDENT ON JURISDICTION

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4-
205406 CR-3618
36207
36211

OFFENSE REPORT
2. ZONE NO 52 NOT FOR PUBLICATION P1
3. OFFENSE HOMICIDE (OUTSIDE)
4. DATE 090675 5. DAY OF WEEK 7 6. TIME 0052 hrs.
7. COMPLAINANT Polk County S.O. 8. SEX-C 9. AGE
10. ADDRESS Lakeland,Fl. 11. PHONE
12. PLACE OF EMPLOYMENT
13. ADDRESS 14. PHONE
15. CORPORATION OR OWNER
16. ADDRESS 17. PHONE
18. REPORTED BY Off. L.E.Troha 19. SEX-C 20. AG
21. ADDRESS 22. PHONE
23. PLACE OF OCCURRENCE 24. DATE AND TIME OF OFFENSE
25. REPORT INVESTIGATED BY Off. L.E.Troha 9759 26. DATE 090675
This Offense is Declared: Unfounded ( ) Cleared by Arrest (
Exceptionally Cleared ( ) Recovery ( )

27. PERSONS ARRESTED

	SEX-C	AGE
	SEX-C	AGE
	SEX-C	AGE
	SEX-C	AGE

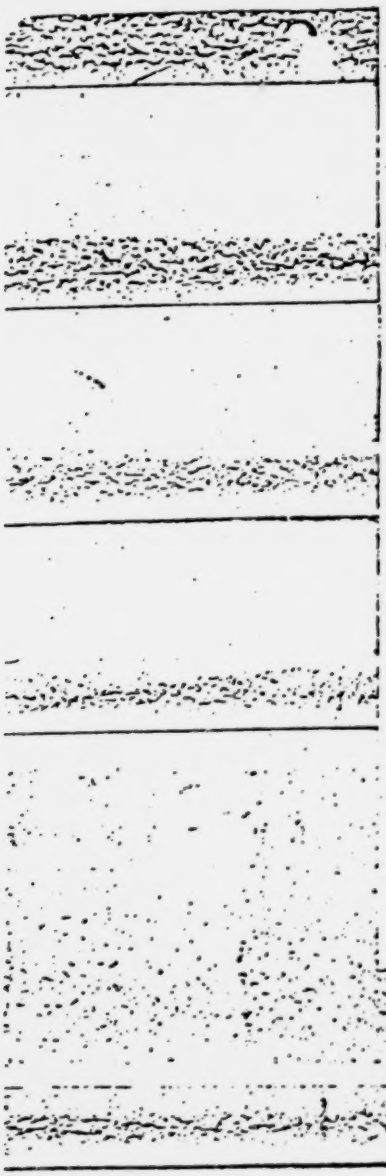
DESCRIPTION OF CAR

28. MAKE 29. MODEL 30. YEAR
31. COLOR 32. TAG NO.
33. VIN NO.
34. REGISTERED OWNER
35. ADDRESS
36. INSURANCE CO.

UCR 01A

RECEIVED IN MAIL 9-11-75

EXHIBIT K.



patched to the 7-11 Store, 633 North Oleander just north of Seabreeze in reference to a w/m who stated he had commited three homicides and wanted to turn himself in. This officer pulled in the 7-11 Store parking lot and a w/m and a w/f came walking up to th patrol car. The w/m stated, "are you here to pick me up, I am the one who called the station." The w/m started to say something else and this writer stopped him and advised him of his rights. I then asked him if he understood his rights and he stated he did. This officer shook him down and placed him i the back of my police car. The w/m is Wesley Irvin Johnson, of 314 University, dob 1-18-56. Johnson's wife, Patty Johnson was allowed to sit in the front seat and taken to the station also. On the way to the station he stated he had killed three people. One was approximately two years ago in Lakeland. He said the subject was a b/m named Mac who was a homosexual. He stated he shot him with a 410 sawed off shotgun. The b/m was in the trunk of a car (Chevrol Impala). He stated he then set the car on fire. Th was at an abandoned black bar near I-4 in Polk Count He stated he robbed the b/m of six dollars before killing him. He said the second person he killed wa a w/m approximately two or three months ago. He picked the w/m up at the Green Parrot Bar which is a gay bar. Johnson and another w/m, Birdman took this w/m Johnson picked up in the bar to Johnson's apartm and robbed him of $11. Johnson and Birdman then mad the w/m get in the trunk of his car and Birdman drov Birdman ran off the road and hit something and damaged the right front of the vehicle and the tire was flat. Johnson then drove on the flat tire to where he stopped and opened the trunk and took a tir iron and ice pick and stabbed the w/m to death. Joh son and Birdman got another car somehow and went to the Waterloo area. Johnson took the same icepick he

CONT'D

had stabbed the w/m earlier that night with and stabbed Birdman to death with it. Johnson then put the body in the trunk and took it to an old abandoned orange grove. There he hit the body in thehead with a shovel and dug a shallow grave and put the body in it and covered it up. Det. Jenkins and this officer interviewed Johnson in the Detective Bureau. He was read his rights and signed a waiver. He agreed to let us tap the interview which we did. He went into detail of each homicide. Detective Jenkins is making a supplement with all the details. Off. Bridges interviewed Patty Johnson. (See his supplement in reference to what Patty Johnson said). Det. Jenkins called the Polk County S.O. and they came over and picked Johnson up. Polk County S.O. request that any press personnel be referred to their department.

N.F.I.

Off. L.E.Troha

LET/sav

Report Investigated By Date

Daytona Beach
Police

SUPPLEMENTARY OFFENSE REPORT

Offense Homicide (Outside) Comp No.
Complainant Polk Co. S.O. D-3665
Address Lakeland, Fla.

On Sat., 9/6/75, this writer was advised that Unit 34, Officer L. B. Troha was enroute to the 7-11 Store on North Oleander reference a W/M who was confessing to three murders over the phone. After Off. Troha picked up the subject I met with him at the Detective Division where the subject was identified as:
Wesley Irvin Johnson, W/M, age 19
DOB: 1/18/56 presently residing at
314 University Blvd.
DBPD ID# 100266

With Johnson and Troha was Johnson's wife, Patricia Johnson, W/F, age 21, DOB: 8/24/54, same address.

This writer had Officer Bridges and Off. May interview Mrs Johnson while this writer and Off. Troha interviewed Mr Johnson.

Wesley Johnson was advised of his constitutional rights by this writer and Johnson signed a waiver form. Johnson agreed to this writer taping the interview.

Johnson then told us that he had murdered three people in the Lakeland, Fla. area.

Report Investigated By (cont) Date

J. H. J. 0630
9/6/75

Daytona Beach
Police 2.

SUPPLEMENTARY OFFENSE REPORT

Offense Homicide (Outside) Comp. No.
Complainant Polk Co. S. O. D-3665
Address Lakeland, Fla.

The first homicide he told us about (according to him) happened about three to three and a half years ago. He related it as follows:
Stated that he had been robbing queers in the Lakeland area. Stated he met up with a black homosexual named "Mack". Johnson described Mack as B/M, 35-45. Stated he had seen Mack around for about 3 months. Stated he picked Mack up and took him (in Mack's car) about 2½ miles outside of Lakeland. Said they stopped near I-4 and near an old abandoned bar. Mack's car was (according to Johnson) a 68-69 Impala (Chevrolet), white in color Stated he robbed Mack of $6.00 and forced Mack into the trunk of the car at gunpoint. Stated the gun he used a was a .410 shotgun that had a sawed off barrel Stated Mack was in the trunk of the car and he closed the trunk lid. Mack had the car keys in his pocket. Johnson then shot into the trunk with the shotgun a couple of times. To make sure Mack was dead, Johnson said he pulled the back seat out of the car and shot Mack again. Johnson said he then got back into Lakeland where he bought some gas in a can at the gas station across from the Lakeland Memorial Hospital. He then went

Report Investigated By (cont) Date

J. H. J. 0630
9/6/75

RA 4

(2)

Daytona Beach
Police 3.

SUPPLEMENTARY OFFENSE REPORT

Offense Homicide (outside) Comp. No.
Complainant Polk Co. S. O. D-3665
Address Lakeland, Fla.

back to where Mack's car was and poured the gasoline all over the car and set it afire. Stated that when he ran from the scene the car was completly engulfed in flames. When asked why he killed Mack, Johnson replied, "For the hell of it and cause he was a goddamned nigger queer".

In reference to the second homicide that Johnson confessed to, he stated that the victim was a W/M, 29-30 yrs old, blonde hair, 6-0, 200#. Stated the subject was a homosexual. Stated he met the W/M in the Green Parrot (apparently a gay bar) in Lakeland. Stated on this murder an accomplice was with him on it. Johnson only know his accomplice as "Birdman". Stated Birdman had a tattoo of a bird on one of his hands.- Stated he and Birdman had been robbing queers. Stated this was about 2-3 months ago when he and his wife was seperated. Stated they picked up this W/M and took his car to Johnson's apartment which was located in the Wabash area of Lakeland. Upon arrival at his apt. Johnson immediatly grabbed the W/M from behind and around his neck. Birdman put an icepick to the W/M's chest. They robbed the W/M of ~~XXXX~~ $11.00. The W/M pleaded for them not to hurt him and John-

Report Investigated By (cont) Date

J. H. J. 0630
8/6/75

Daytona Beach
Police 4.

SUPPLEMENTARY OFFENSE REPORT

Offense Homicide (outside) Comp. No.
Complainant Polk Co. S.O. D-3665
Address Lakeland, Fla.

son assurred the W/M that they wouldn't hurt him. Johnson said he convinced the W/M that all they were going to do was put him in the trunk of his car (the back car) and drive him to a spot just outside Lakeland and leave him there. Johnson said he told the subject he could then kick out the back seat and get out after they had gone.

Johnson said Birdman drove the car which he described as a 68-70 Chevrolet, factory blue in color. Stated the W/M was in the trunk and they drove out to the Kathleen area. On or near a sharpe hairpin curve Birdman ran off the road and struck something causing the tire to blow out and causing some damage to the right front of the car. From that point Johnson said he drove the car on around the hairpin curve until the car stuck. State this was about 1-1½ miles out of Lakeland. Johnson said where the car stuck there was a house 200-300 yards away. Stated when the car stuck he knew he had to kill both the W/M and Birdman. Johnson then said the only reason he killed Birdman later was because Birdman made him kill the W/M. At any rate, Johnson said he got out of the W/M's car and opened the trunk.

Report Investigated By (cont) Date

J. H. J. 0630
8/6/75

RA 5

(3)

Daytona Beach
Police 5.

SUPPLEMENTARY OFFENSE REPORT

Offense Homicide (outside) Comp. No.
Complainant Polk Co. S.O. D-3665
Address Lakeland, Fla.

Stated that when he opened the trunk he had a tire jack (the type with a pointed end) in his hand. Johnson said the ~~XXXX~~ W/M pleaded for his life but Johnson ~~xx~~ said he, using both hands on the tire jack, stabbed the W/M in the chest several times. Said he then took the ice pick that Birdman had and stabbed the W/M several more times.

Johnson said he ~~xxxx~~ and Birdman got into another car that was there. When questioned about this other car all Johnson would say was the car "was there", leaving this writer to believe that he and Birdman may have stolen the car. Anyway, Johnson said that he and Birdman went to a gas station and bought some gas and returned to the W/M's car and poured the gasoline all over the car and set it afire. They then left in the other car.

Johnson then stated that they drove to an area known as "Waterloo" which was a camp area with a lake. There Johnson said he stabbed Birdman with the icepick numerous times. Stated he also tried to drown him, but he was sure he was dead. Stated he wrapped Birdmah in a blanket

Report Investigated By (cont) Date

Det. J. W. Jenkins 0630 9/6/75

Daytona Beach
Police 6.

SUPPLEMENTARY OFFENSE REPORT

Offense Homicide (outside) Comp. No.
Complainant Polk Co. S.O. D-3665
Address Lakeland, Fla.

and put him in the trunk of the car. Stated that he drove to an area known as the Highlands. He pulled off a two lane paved highway into an orange grove Stated he drove about 500-600 ~~xxx~~ yards into the grove and turned left onto a spray truck road. He went another 200 yards or so and stopped. He then drug Birdman about 50 yards off the spray truck road where he dug a 2' shallow grave and buried him.

Johnson said the orange grove was 1-1½ miles outside of Lakeland.

Johnson said that when he buried Birdman he bashed him in the head with the shovel

For information concerning the interview of Mrs Johnson, refer to Officer Bridges supplement. In conferring with Off. Bridges it was found that she told ~~xx~~ Jones and Off. May essentially the same thing but not in as much detail of course

This writer placed a call to Polk Co. S. O. and spoke to Sgt George Elliott. He confirmed that they had investigated two murders where the victims had been burnt in the trunks of the cars, one about two

Report Investigated By (cont) Date

J. W. J. 0630 9/6/75

RA 6

(4)

Daytona Beach
Police 6.

SUPPLEMENTARY OFFENSE REPORT

Offense Homicide (Outside) Comp No
Complainant Polk Co. S. O. D-3665
Address Lakeland, Fla.

1049 Jewell St, Lakeland, Fla. He was murdered on 7/29/75.

The third victim (Birdman) is James Wagner, W/M, about 20 years old who lived on Herschell St in Lakeland. Det. Reed confirmed that Wagner was apparent killed the same night Arnsderff was kil led as their investigation revealed the Wagner hadn't been seen since then.

For additional information refer to OR# D-1729 where this writer and several Tact Squad men had Johnson under surv- eillance for some time Ea due to state- ments he made about various criminal activities, however we never saw him leave his house on University.

Johnson was turned over to Det Reed and Johnson was not booked into our Jail.

Det. Reed requests that any further in- quires from the news media about this i vestigation be refered to the Polk Co. S. O.

Case cleared by arrest and continued.

Det. J. N. Jenkins 0630

Report Investigated By 9/6/75 Date

Daytona Beach
Police 7.

SUPPLEMENTARY OFFENSE REPORT

Offense Homicide (Outside) Comp No
Complainant Polk Co. S. O. D-3665
Address Lakeland, Fla.

years ago and another a month or two ago. He stated he would have his inves- tigator immediatly call me.

A few minutes later I received a call from Det. Norm Reed of the Polk Co. S.O.

Det. Reed stated that he had just recen- tly developed Wesley Johnson as a prime suspect in the two murders and he also suspected that Birdman had been killed too, but had never found him. Stated he was immediatly enroute to take custody of Johnson.

At 5:20 AM, 9/6/75, Det. Reed and Sgt Elliott arrived at the DBPD. They lis- tened to the taped interview and reques- ted it be turned over to them as evidence

The tape was turned over to Det Reed. (see attached supplement)

Det. Reed advised that the B/M that was killed was Caleb McDowell, N/M, 39 of 636 West Eight St, Lakeland, Fla. The subject was murdered on 8/3/75.

The W/M homosexual killed in the burning car (the 2nd victim) was John Mitchell Arnsdorff, W/M, 39 of

Report Investigated By (cont) Date

(5)

Daytona Beach
Police

SUPPLEMENTARY OFFENSE REPORT

Offense Homicide (Outside) Comp No.
Complainant Polk Co. S. O. D-3665
Address Lakeland, Fla.

Received from the Daytona Beach Police Dept the following evidence:

one (1) TDK cassette tape containing the confession of Wesley Irvin Johnson.

Person Receiving Evidence:

Det. Norm Reed
Polk County Sheriff's Dept.

Person Relinquishing Evidence:

Det. J. H. Jenkins
Daytona Beach PD

Witness: Sgt George Elliott

Report Investigated By Polk Co.S.O. Date

DATE: September 6, 1975

Daytona Beach
Police

SUPPLEMENTARY OFFENSE REPORT

Offense Homicide-Outside Comp. No.
Complainant Polk County S.O. D-3665
Address Lakeland, Florida

(1)

On 09-06-75 at 01:30AM this officer interviewed Patricia Johnson W/F age 31, DOB 8-24-44 of 314 University Blvd.

Patricia Johnson is married to Wesley I. Johnson W/M age 19, DOB 1-18-[illegible] of the same address.

Patricia Johnson stated that she met her husband on March of 1974 and they married in August of 1974.

Patricia Johnson stated that just prior to their marriage, that Wesley told her that he had killed a man in Lakeland (Polk County), Florida. Patricia stated that Wesley told her that he tried to rob a W/M homosexual and ended up shooting him then put him in his vehicle and set the vehicle on fire with a can of gasoline.

Patricia Johnson stated that several times since their marriage that they have gotten into a fight and Wesley has gone back to Lakeland where he is originally from.

About 2 or 3 months ago(June or July) Patricia stated that Wesley told her that he had killed two more people in Lakeland during one of his trips back there.

He told Patricia that one of the subjects was a W/M and one a W/M and that one was a homosexual and the other was

Report Investigated By Date

R.A. 8

(16)

Daytona Beach
Police

SUPPLEMENTARY OFFENSE REPORT

Offense Homicide-Outside - Comp. No.
Complainant Polk County S.O. D-3665
Address Lakeland, Florida

(2)

He gave no motive as to why he killed them but stated he killed one with an ice pick and the other with a tire iron. Patricia says that he told her he buried both in an orange grove.

Subject Wesley I. Johnson has a definite mental problem according to his wife and earlier this year he shot himself in the head and spend about 1 week in the Halifax Hospital 1400 Ward.

Patricia Johnson says her husband dreams about the killings often and that it bothers him but that he doesn't talk about them except when he's drinking.

She says that he often says that he has to urge to go out and kill and that he doesshave a bad violent temper and he usually takes the temper out on the furniture but tonight he killed a cat with his bare hands.

Patricia Johnson says her husband spent 1 year on the Okeechobee shcool for boys when he was a juvenile and besides that she only knows about him being arrested one time and that was several months ago on Main St in Daytona Beach for fighting.

A check with records revealed that Wesley I. Johnson was arrested on 3-19-75 for Disorderly Intoxication, ID # 100266.

Report Investigated By Date

D. L. Bridges

21 1975

Daytona Beach
Police

SUPPLEMENTARY OFFENSE REPORT

Offense Homicide-Outside Comp.
Complainant Polk County S.O. D-3(
Address Lakeland, Florida

(3)

Patricia Johnson stated that she believes her husband is capable of killing another human being but she isn't sure if the stories he tells her are truth or not.

Patricia Johnson stated that she doesn't know any more particulars about the supposed killings. She stated that her husband never said if he knew the subjects and he never mentioned anything about their names or ages, etc.

Wesley Johnsons mother still lives in Lakeland but Patricia Johnson would not tell this officer her address because she didn't want her to find about it.

No further information or police action taken at this time.

Off. R.D. May was present during the entire interview of Patricia Johnson.

Off. D.L. Bridges
ID# 9025

D. L. Bridges

Report Investigated By D

CIRCUIT COURT
POLK COUNTY

CERTIFIED TO BE A TRUE COPY
Attest: E.D. "BUD" DIXON, Clerk
Circuit Court - Criminal Division
By: Debra J. Hart
Deputy Clerk

RA 9

Section	SHERIFF'S OFFICE SUPPLEMENTARY REPORT MONROE BRANNEN, SHERIFF POLK COUNTY, BARTOW, FLORIDA	Complaint P- CC# 36211 C/R# 36207, 205406

September 6, 1975

r:· Lt. Chuck Keeney

pproximately 3:00 A.M., this date, Writer received a call from Det. of the Polk County Sheriff's Department who had received a call from th na Police Department stating that a subject had come into their depart- and confessed to being involved in three homicides in Polk County. riter instructed Det. Reed at this time, to go to Daytona Beach Police rtment and take subject into custody and return him to Polk County. Thi ect's names is "Wesley Irvin Johnson", a white male, nineteen years of a At approximately 8:30 A.M., this date Writer met with Det. Reed at the land Sub-Station where he had brought the subject from Daytona Police rtment. In a brief interview with the defendant, Wesley Irvin Johnson, er learned that he was involved in the homicide of Caleb McDowell, CC# and the homicide investigation of John Mitchell Arnsdorff, CC# 36211 a lso stated that James Wagner, missing person at this point (CC# 37618) also a victim of a homicide and that he, Johnson was responsible for th h of Wagner.

In brief, concerning the death of Arnsdorff and Wagner, Johnson related riter the following story: That he had met Wagner in a bar on South Fl ue, Lakeland, Florida and from there went to the Green Parrot on East Street in Lakeland, Fla. where they met Arnsdorff and then from there went to an apartment occuppied by Johnson on Swindell Avenue north of rial Blvd. and after a drinking party had taken Arnsdorff to his own tment on Jewell Street in Lakeland, where they robbed him and tied him placed him in the trunk of his own vehicle and drove him on the preten

Form No. 41A EXHIBIT E

Reporting Officers: | Date

g him somewhere just to leave him unharmed. According to Johnson, en-
to the place where they were to abandon him, the car struck an abutmen
iffin Road. Then the vehicle was driven with the damaged right front
to the point where it was finally found burned with the body of Arns-
in the trunk.

n his verbal statement to Writer, Johnson stated that he stabbed Arns-
with a tire iron several times before setting the vehicle on fire. Th
lone in the presence of James Wagner. The story gets a little vague at
point. Wesley Johnson deliberatlely evades the question and the point
second vehicle or any other parties other than himself and Wagner. He
state that they went to a service station after the vehicle's damaged
l got stuck in the dirt and purchased some gasoline. They brought it b
car and doused the vehicle with the same. They then set the vehicle on
and left the area. They went to an area known as "Waterloo", which is
ing and swimming area located in the same area as the old YMCA campgrou
of Highway 33, just north of the Lakeland city limits, south of the Old
ee Road or Deaton Estates. At this point, Johnson states that he becar
ttle bit uneasy about Wagner and concerned about him being able to kee
mouth shut and decided that he would have to do something with Wagner.
his point, Johnson states that he stabbed Wagner with an ice pick in t
st several times and then when he was still not dead he held his head u
water until he thought that he was dead or he had stopped moving. He
tes that he went from this point to a point in a grove in the Lakeland
hlands, south of Lakeland and there buried the body of James Wagner.

Sheriff's Form No. 41A

Investigating Officers: | Date

ge -3-

It may be noted in this summary that at no time did Johnson mention me of "Lurch", Dennis Wayne Smith or the vehicle used to carry out the the offense after the burning of Arnsdorff's vehicle.

Writer, Sheriff Brannen, Sgt. Lang, Sgt. Boydston, Sgt. Stewart, Sgt n Taylor, Det. Norm Reed along with Public Relations Officer Dan Taylor e defendant went to a grove in the Highlands under the direction of the fendant. In this grove all officers took part in a search for the body James Wagner. This search continued on through the entire day, which turday, September the sixth. The search was not a success, the body wa t found at this time. Johnson stated that he was in such a drunken con on having been drinking tequila and beer mixed that he could not rememb e exact location of James Wagner.

Writer and Sheriff Brannen did transport Wesley Irvin Johnson to the unty Jail where he was booked in on three counts of first degree murder would be involving the deaths of one Caleb McDowell, John Mitchell Arn d James Wagner. No bond was set at this time.

The date is now September 7, 1975, 0800 hours. Writer met with Sher annen at his home and did travel back to the Lakeland Highlands to the r the purpose of conducting another search. A search was conducted of oves in the area of Highlands City, west of Highland City. The area is dered on the north by Clubhouse Road, on the south by Central Barn Road, e west by Lakeland Highlands Road and on the east by Highlands City its arch was made by Deputies on horseback assisted by Aux. Deputies on foo rected by Sgt. Nemeth. Writer enlisted the aid of the Sheriff's plane

is search and this plane was used in making aerial infrared photographs Hoskin of the Ledger did the photography from the plane. The search tated at approximately 8:30 P.M. and concluded at 1600 hours, no body ound at this time.

/riter, in an effort to gain assistance of every agency possible in atte :very method of trying to locate a body, did contact the Air Force at 1 Air Force Base requesting further assistance with color infrared. Wri: referred to NASA and to a Capt. Morrison at a phone number of A/C 713, 0123, which is in Houston, Texas. Writer was unable to make contact wi: ne in the military at this point that had any knowledge of infrared fil: to get in touch with.

On September 8, 1975 at 0830 hours, Writer again attempted to contact , but was unable to make any connections at this point. Calvin Engh of Lakeland Ledger did contact Writer by phone this date and advise him th ibly, Senator Lawton Chiles, the United States Senator from Lakeland co ibly to able to assist in getting some action from the Air Force. Writ contact Mr. Lewis Roberts of Senator Chiles staff requesting assistance Roberts stated that he would contact the Pentagon, the Secretary of Ai: :e and ascertain what methods could be used in obtaining the assistance Air Force.

Writer did receive a call back from Mr. Roberts stating that he was un locate anyone that was familiar with this particular means of locating 1 infrared film.

September 8, 1975: Writer received a telephone call from Mrs. Patrici

nson. Mrs. Johnson requested that she be able to talk to Writer at th
eland Sub-Station. In an a recorded interview with Mrs. Johnson at th
eland Sub-Station, this date she did state that on one or more occasi
husband, Wesley Johnson talked about the murder of a black man in the
nk of a car, a 1973 (in reference to the death of Caleb McDowell, CC#7
i that he also recently had talked about having participated or had kn
ge of the homicide concerning the death of a white man, John Mitchell
nsdorff in the trunk of a car (CC# 36211 and CC# 36207) and also the f
at he had knowledge of a missing person by the name of "Wagner". The
ew with Mrs. Johnson was recorded and will be transcribed and included
is report.

ptember 8, 1975:

Writer received another call from Mr. Jim Connor of Kissimmee inqui
to the progress in the case and whether or not Johnson had told the co
ory as to was had happened in the three homicides.

ptember 8, 1975
:04 A.M.

Writer received a call from Sgt. Banks in the Communications Center
e Polk County Sheriff's Department. Sgt. Bank's stated that an anony-
ller stated that the body of Wagner was in a pit somewhere. Writer r
at a tape of this conversation be included in the report.

ptember 9, 1975

Writer contacted Hardy Pickard, Assistant State Attorney requestin
interview be set up with Wesley Johnson for the purpose of taking a

sition from Mr. Johnson. Wesley Johnson was brought to the State Attor
ce along with his appointed attorney, Dennis Maloney of the Public Defe
ce. At this time, Mr. Dennis Maloney advised Mr. Johnson that it would
er if he did not make a sworn deposition at this time. Mr. Johnson com
the wishes of his attorney and did not make a statement. Writer, for
st time in this investigation did advise Mr. Johnson that his companion
se crimes was already known and that his companion was in jail, namely I
ne Smith. Writer also informed Mr. Johnson at this time, that the vehi
d to leave the scene of the offense after Arnsdorff's car was burned wa
o in custody and certain evidence was obtained to implicate Mr. Smith i
s homicide.

tember 10, 1975

Writer received information, telephonically from Mrs. Wesley Johnson t
husband, Wesley Johnson wanted to tell the whole story about the three
ders. Writer advised Mrs. Johnson to meet him in Bartow at 11:45 A.M.,
s date and I would allow her to talk to her husband. The agreement wa
t Johnson could talk to his wife for ten minutes or longer and he woul
willing to tell the story as it was. After Writer met with Mrs. Johns
d her husband in Bartow, Johnson informed Writer that he had talked to
torney in the interim and he was advised not to talk to Writer about th
ree homicides. At this point, Wesley Johnson did tell Writer in the pr
his wife that he was with Dennis Wayne Smith on the night of these mur
d did take part in the same. Johnson also stated that he had give a co
te statement to his attorney, Jerry Hill, also with the Public Defender
fice concerning all three deaths, these deaths being McDowell, Arnsdorf

agner. Mr. Johnson made the statement that his attorney did not want t
elease this information to the State Attorney's Office until after they
ould possibly use it for "plea bargaining". Mr. Johnson stated or agre
o plead to three counts of second degree murder with the agreement that
ould turn states evidence against Dennis Wayne Smith or whoever may be
olved in these crimes. Mr. Johnson was returned to his jail cell and
riter returned to Lakeland.

eptember 10, 1975

Writer received a call from Mrs. Ann Dahlquist of Route 1 Box 679,
anor, located just north of Club House Road between Dismuke and Grand
the Highlands south of Lakeland. Mrs. Dahlquist's telephone number
6-3322, she is employed, her office number is 533-9011. Mrs. Dahlqui
ted the following information: Mrs. Dahlquist's elderly mother who h
en away on vacation in the month of July had returned on or about the
f July and three to four days from that time at approximately four or
'clock in the morning, on a night when she was unable to sleep she was
her bedroom window, which is in a mobile home, the back part of the
ing near a grove. At this point, she heard what she thought could be
truggling, working or doing some kind of physical labor, something ph
the grove immediately behind her house. Mrs. Dahlquist's mother st
e listened until she heard the men get in a vehicle,which she did no
art it up and drive out of the grove toward Club House Road. Writer
to this grove and searched the area for a grave of some kind. This
ular grove is a small grove located at the corner of Dismuke and Clu
Rd. The grove is very rough as far as driving through it is concern

grassy. While in the area, Writer did contact the owner of the grove, Bruce Wilson who lives west of the grove on Club House Road. Mrs. Wilson stated that she and her family had been gone on vacation for the most part of July and returned home on August 3, 1975. Mrs. Wilson stated that she did have the grove chopped, which would have been about the first week of July. Upon their return, on August the 3rd, Mrs. Wilson's husband, Bruce did remark that he had seen where a car had been in the grove and had driven out on to the highway. Mr. Wilson, according to his wife made the statement that he couldn't understand why anyone would have been in the grove, since it was not the fruit season and there was not any fruit to steal and that it was not a common open grove for a lover's lane and such as that. Mr. Wilson, at this time, was away in New York and Writer was unable to interview him. Mrs. Wilson said that she would be talking to her husband over the weekend and ask him if he could determine which row the vehicle came out of so that we could concentrate our search in one particular area.

Lt. Chuck Keeney

sf

POLK COUNTY, BARTOW, FLO DA | C/R# 36211

Date: August 15, 1975
Writer: Lt. Chuck Keeney

In examining some of Mr. James Wagner's personal belongings at his h plastic type-card carrier was found with the identification cards, dri license etc. of one Kathy Elizabeth Taylor of Rt. 2 Box 815 A., Dover, F as found. This item was found by Mr. Wagner by going through some of h on's, James' personal belongings in his room at their home at 1105 Harts venue in Lakeland. Mr. Wagner turned this item over to me this date. lid contact Det. Jeffries of the Plant City Police Department requesting n locating Kathy Elizabeth Taylor, of Rt. 2 Box 815 A., Dover, Florida. of this writing, no information has been received as to the whereabouts s. Taylor. Writer was unable to determine why this particular item wa James Wagner's possession at this time.

Lt. Keeney
Lakeland Sub-Station

sf

Sheriff's Form No. 61A

Investigating Officers: | Date

Classification	SHERIFF'S OFFICE	Complaint No.
Item (2)	SUPPLEMENTARY REPORT MONROE BRANNEN, SHERIFF POLK COUNTY, BARTOW, FLORIDA	CC# 36211 P3 C/R# 204506 C/R# 37618

This is 9/6/75, 1:30 A.M.. Present is Det. J. H. Jenkins, Officer L. E. Trouha. We are taking this statement of Wesley Irving Johnson, white male nineteen of 314 University Blvd..

Q. Wesley, I have advised you of your Constitutional Rights, you have signed a waiver form and do you still wish to make a statement at this time?

A. Yeah.

Q. Ok, now ----

e Voice: Just talk normal----

Q. Just forget about it cause that will pick -- it will pick it right up.

e Voice: Just talk normal----

Q. Just forget, you know the tapes there.

A. Ok.

Q. Now let's take ah----

A. Your not going me no more after this?

Q. No, we'll----

A. Ok.

Q. Remember we want to go with victim number one which is "Mc", just start right there.

A. Alright, "Mack" was the black homosexual between the age of thirty-five and forty-five.

Q. Hu-huh.

A. He was shot in the chest and in the abdo -- abdomen, I suppose, I locke him in the trunk and then I had to cut out the back seat and shoot him again and I was scared the gas tank (not audible), I was scared I was going to hit the gas tank and it was going to blow up, but I didn't I shot him, he was shot----

Q. With ah, with a four-ten?

A. --four-ten, four-ten sawed off shotgun, I don't remember the size pelle

Q. Were they laying in the trunk?

A. He was in the trunk----

Q. With the (not audible)----

A. He was -- no, he was in the trunk, the trunk shut and he had the keys with him, the car keys with him, is -- that's why I cut open the back to shoot him again to make sure they he was dead.

Q. So how many times did you shoot?

A. Between two and three times, I'm not really sure it's been quite a while.

Q. Whose car was -- was that?

A. It was his car, it was a white Chevrolet, the Chevrolet was in, hold on a minute let me think about it, it was in ah, it was, I believe between a sixty-eight and a sixty-nine white Chevrolet Impala, it was -- it was an Impala.

Q. And exactly where did this take place at?

A. This happened on Interstate I-4, off of Interstate I-4 at an abandoned bar that had been abandoned for a quite a year -- quite a few years, he was shot there and killed there.

Q. No, ah, this was (not audible) near Lakeland?

A. Yes, it was near, it was in Polk County, it was rather close to Lakeland because the gas that was bought to pour over his car and over him was bought at a ah, a gas station across the street from the Lakeland Memorial Hospital, ah I forget the name of the damn gas station (not audible) any how he was the first person I killed.

Q. Alright, let me ask you a question about "Mack", ah how long had you know Mack when -- when you shot him?

A. Ah, three months.

Q. Alright, and you knew he was a homosexual, is that right?

A. Yeah.

Q. Alright, can you tell me why you shot Mack?

A. For the hell of it.

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Johnson, Wesley

Q. No -- no reason? Was -- was it because he had done something to you?

A. Because he was a God Damn nigger queer.

Q. Ok, how did you come about being with Mack that night?

A. Because I'd been robbing queers for about the past two or three months.

Q. Up to the death of Mack?

A. Yes.

Q. Ok----

A. And I'd met Mack through a person and we'd, I had robbed him and he I had felt like he should die----

Q. (not audible)----

A. --and so I shot him.

Q. Was it your gun?

A. Yes.

Q. And what did you -- no, let's see, after you shot him, you said you went into Lakeland and bought some gas?

A. Right----

Q. And you went back to the car?

A. Back out through the car, it was about, it was between, it was about a half hour span after the shooting.

Q. From the time that you got back to the car?

A. From the time I got back to the car.

Q. How far out of Lakeland did you have to drive?

A. We were about ah, shit, I was about -- I was about ah, well,----

Q. I mean is it a mile or two miles out of Lakeland or ten miles or five miles----

A. It was -- it was----

Classification	SHERIFF'S OFFICE SUPPLEMENTARY REPORT MONROE BRANNEN, SHERIFF POLK COUNTY, BARTOW, FLORIDA	Complaint No.

Q. -- just approximate----

A. --between -- it was between two to two and a half miles out of Lakeland because it was a lot of dirt roads, first you had to drive through the orange grove----

Q. Hu-huh.

A.. -- and then you had to go on out, I mean it was, you know it's about two and a half miles after you (not audible) crooks and turns on the road.

Q. Did you rob Mack before you ah----

A. Yes, six dollars.

Q. Six dollars, ah----

A. --robbery or----

Q. --now after you -- you said you went to town and you got the gas and you went back----

A. Right----

Q. --and ah, then you said that you poured gas all over the car?

A. I poured gas across the trunk of the car because that's where he was at he was in the trunk of the car, I poured gas across the trunk and then I poured it over the rest of the car hoping to, you know burn up my fingerprints and what not and I, you know if they can keep fingerprints in it they can check them right out and----

Q. Right.

A. --and we poured gas -- I poured gas all over and fell down, that was during the winter cause I was super drunk.

Q. Hu-huh, (not audible) all this happened you were super drunk huh?

A. Ah, I was ----

Q. On -- on what, booze or ----

A. I don't do dope.

Q. Strickly booze huh, ok.

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Johnson, Wesley

A. The most powerful thing I do is rum, which kicks my ass.

Q. Ok, now ah, did the -- you said you ran, but to your knowledge did the car completely burn up?

A. The car was totally in flames----

Q. When you left?

A. When I left.

Q. Alright, do you remember reading about this Mack in the -- all in the papers?

A. Yeah, two days, ah, not even two days later ah, day and a half later the evening edition of the Polk County Ledger.

Q. Ok, and can you tell me about when and how long ago this was?

A. I'm sorry, no, I can't it was between, I swear to God, it was, let's see I was just about seven -- six, I was between, well, I was about fifteen when I got out of juvenile home----

Q. Hu-huh.

A. --and this happened when I got -- I was just about sixteen when it happened.

Q. And you are how old now?

A. Nineteen, ----

Q. This happened about three years ago, three and a half somewhere right in there?

A. Figure it up, yeah, whatever.

Voice: What were you in the boy's home in Ockeechobee for? You said this happend right after you got out of Ockeechobee----

A. I was in Ockeechobee for assault and battery.

Q. Talk about it or ---

A. On a police officer.

Q. Ok.

A. I didn't mean to do it, but I was flipped out on acid.

Q. Ok, alright Wes now----

A. And I didn't mean to be flipped out on acid either, some asshole gave me some acid and I flipped out.

Q. Let's talk about the number two victim.

A. Right, the number victim and number three victim happened in the same night, the same -- my wife, whose name better not be mentioned or I'll just cop out or whatever and just bullshit all----

Q. No, no we are just talking with you?

A. Ok, well----

Q. Your wife isn't involved in it at all.

A. Ok, the only thing she can say is the months we seperated in the second mur -- the second murder and the murder happened. The first murder the victim was a white caucasian, ah----

Q. You mean the second one?

A. Yes, not -- after Mack, Mack was a nigger.

Q. Your talking about the first one after Mack, right?

A. Right----

Q. Ok, that -- we are referring for the tape here, we are referring to the second murder----

Voice: I got it listed on my pad here, that it's number two.

Q. Alright, ok.

A. The second murder, I understand, ok, the second murder was a white male, between the age of ah, Jesus, he was between the age of ah, Jesus Christ, twenty-nine and thirty-five, he's between age of twenty-nine and thirty-five.

Q. Ok.

A. It was at the Green Parrot Bar in Lakeland, Florida.

Q. Now is this where it happened or this is where you met him?

A. This is where met him.

Q. At the Green Parrot?

A. Green Parrot.

Voice: Is this a "gay" bar?

A. Yes, it's a queer bar, it's been queer for a long time.

Q. That's in Lakeland, right?

A. In Lakeland, Florida, "Bird", you'll have to excuse me for mentioning him gentleman, but you know, he was a participant.

Q. Alright.

A. "Bird", I do not know his real name, the "Birdman" is what we called him, what I called him.

Q. Birdman?

A. Birdman, he had a tatoo of a bird on his hand, I -- I don't remember which hand it was.

Q. Ok.

A. Ok, Birdman was a participant, he was supposed to set one queer up so we could rob -- so I could rob him, me and him, you know to pick up five or ten dollars for some beer.

Q. Hu-huh.

A. And he was pretty hollow about it, I mean he was pretty bullshit, so I picked him up, you know and we took him to by apartment and robbed him.

Q. Do you know -- now what did he tell you his name was?

A. Swear to God, I don't remember, I mean -- I mean in a situation like that, when your picking up a queer----

Q. Ok, well, tell me something about him, I mean did he have long hair?

A. Alright, he had blonde hair, ah he had blondish hair, he was about your size, but----

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Johnson, Wesley

Q. So he was about six foot?

A. Yeah, about six ah,----

Q. About hundred and ninety, ah a hundred and----

A. --no, he was about two hundred----

Q. About two hundred----

A. --and he was really big through the shoulders.

Q. Ok,----

A. Ah, in the apartment, I grabbed him around the neck and Bird put the ice pick to his chest.

Q. He stuck it in him?

A. No.

Q. He just put it to his chest?

A. Put it to his chest.

Q. Ok, now Bird did this?

A. Yeah, I killed him, I killed Bird too.

Q. Alright, now wait a minute, when you got in the apartment----

A. (not audible)

Q. --at your apartment, now this was in Lakeland, do you remember the address there? Or what street it was on or----

A. I,beleive this or not, I can't tell you because if I told you the apart ment or the street it would involve, if you can promise me though on this tape recording that the people, that they didn't know nothing abou it, they probably----

le Voice: They'd never be----

Q. We are not going to bother them.

A. Ok, well----

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Q. I promise you that.

A. Alright, this chick turned me on to a per -- she moved in with a friend of mine and she paid a months rent----

Q. Right.

A. --and then she moved in with a friend mine and she had the apartment until she gave it to me because I was seperated from my wife and he was a good friend of mine and he talked to him, you know she had a months rent paid and she gave it to me----

Q. That's all----

Voice: Well, we just want to know the address we don't -- were not going to involve her.

A. The address was ah, tell me names of crooks, it was the "Crooknuts", swear to God, it was ah, the street was beside a welding company, the street was beside a welding place where they do welding.

Q. Is that where----

A. It was all -- it was in Wabash.

Q. (not audible) it was in Wabash----

A. (not audible)

Q. --where the apartment was at?

A. Right, any policeman in Lakeland knows where the Wabash area is,it was across the bridge, it was in the Wabash area----

Q. Hu-huh.

A. And like you go across the bridge and you pass two or three streets and there's a welding -- Hicks, the street was two or three blocks, two and three, between two and three streets down from Hick's Welding and there was a hotel on the other side, exactly on the other side of it and there' only one hotel I know of on that side of the street.

Q. The house was right across from the hotel?

A. About across from the hotel, it was between the hotel and Hick's Welding.

Q. Ok.

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A. It had no electricity because, you know she never got together the money to pay for the electricity, so I said, "What the hell", you know I just knew it was a place to (not audible) and screw women at and this and I'll break your nose.

Q. Now, you say you got this guy inside the house and as soon as you got in the apartment you grabbed him from behind and "Bird" put a ice pick to hi chest?

A. I grabbed him around the throat and Bird put -- "Birdman", there you go, Birdman put an ice pick, you right around here----

Q. Alright---

A. --just teasing him with it, you know.

Q. What was said?

A. "If you ever (not audible) we'll cut off your nose".

Q. And then what happened?

A. The poor son-of-a-bitch gave us his money.

Q. How much, do you remember?

A. Around eleven dollars.

Q. Eleven dollars. Alright, and then what happened?

A. I promised him that nothing would happen to him if he would let me tie him up and put him in the trunk of the car.

Q. Is this his car?

A. His car, Chevy.

Q. Ok.

A. And drive him to an area and leave him, that way he could kick out the back seat, you know from the trunk you can kick out the back seat of the God Damn car, if you've got enough energy, I mean if you want to get out bad enough and you know, he would be there, you know. He asked that his wallet be left on the front seat, he wanted his wallet, you know he wanted his wallet there, I supposed it was contacts or semimental value or whatever. The car was wrecked on the way, the car was wrecked----

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Q. Now wait a minute, so you tied him up and----

A. We tied him up, we put him in the trunk of the car.

Q. What kind of car was this?

A. It was a Chevy.

Q. -Do you know what color it was?

A. Jesus, it was ah, I think it was faded blue somewhere in that -- it was burned all to hell and back when I poured the gas all over it, but it was pale blue.

Q. Ok, now ah, faded blue Chevy, about what year, do you remember?

A. Yeah, it was around a sixty-eight, sixty-nine (not audible)----

Q. About the same as the other one though.

A. Yeah, it was, at the most it was seventy.

Q. Where did you drive the car to with him -- well, first of all let me ask you this, you tied him up in the apartment or after you put him in the trunk?

A. No, we put him in the trunk.

Q. And tied him up?

A. (not audible) rephrase that Gentleman, we did not tie him up, we put in the trunk, because I promised him that I would not kill him, gee, I'm sorry (not audible)----

Q. Ok, so----

A. He was in the trunk of the car?

Q. Who drove?

A. Bird did.

Q. Ok.

A. We were driving down the road and we were driving down the road and he w in the trunk of the car and the mirror was all fogged up, you know it wa

it wall messed up we could see out the back, you know if you turned aroun the mirror was all messed up, so me and Bird, Bird was trying, -- I said, "Hey, your fucking mirror messed, I'm going to fix your mirror so you can see behind you" and he's fixing the mirror and he ran off the road, cause we were fucking drunk (not audible)----

Q. Where did you hit something?

A. We had run off the -- it was in the Kathleen area.

Q. Where you ran off the road?

A. Where we ran off the road and the tire popped, the tire busted, one of the front tires.

Q. Ok.

A. And the hub marks ran, the hub marks on the road cause I took over driving, the hub marks, you know where the----

Q. Right.

A. --rim runs on the road----

Q. Righ.

A. --ran until where he was killed at.

Q. Alright, and then what was the area where you took him (not audible).

A. It was in the area where Steve Holt was killed, Steve Holt died on a -- he was a friend of mine in high school, it was around there I believe----

Q. (not audible) name of a street or a road or business or something near b

A. Not really, I don't know man, I just----

Q. How far out of Lakeland was this?

A. It was ah, it was in Polk County, it was about a mile and a half, I gues out of Lakeland.

Q. Ok.

A. Anyhow the car, I rounded a curve, I was driving, I rounded a curve and the car stuck cause when I hit the curve, like it was a hair-point, you know like a, you know----

Q. Road end?

A. Yeah, a hairpin curve and it stuck and I couldn't get it out cause, you know, the son-of-a-bitch (not audible) I couldn't get it out and I -- I thought to myself, I got to kill them both cause the cars stuck, so I got to kill them both, because Birdman -- the only reason I killed Birdman was because he made me kill the other dude.

Q. Alright, let's get to the first dude you've got in the trunk, now how -- now how did you come about killing him?

A. Alright, the car is stuck, there was a house about two hundred to three hundred yards away, it was off the corner, right off the curve, ok, I openned the trunk with the keys and I had the jack handle in my hand, cause I kept it in the car in case he, you know misbehaved, I didn't want to hurt the dude, only believe me, I didn't want to kill him, but I did, but I'm an asshole, but I had it there in case he misbehaved so I could tap him on the head and make him, you know lay down and be cool about it, ok, I openned the trunk and I knew I had to kill him.

Q. Now he was awake and----

A. He was -- he was just saying "Please don't (not audible)"----

Q. ok.

A. --he was saying the same thing, I would have said, he was saying, "Please don't hurt me, you got my money, just don't hurt me", that's exactly what I would have said.

Q. Alright, but what did you do?

A. I stabbed him a whole lot with the jack handle.

Q. Ok-----

A. --with the end of it.

Q. You talk about it like a jack handle used to jack up a car?

A. Jack up a car, the points are wedged in, I stabbed him in this part.

Q. In the chest area?

A. Yeah, with it and I tried to stab him in it cause I wanted him to die fast, I didn't want him to lay there and (making moaning noises) and all that shit and then I stabbed him with the knife, I made Bird watch

I made Bird man watch, then I took Bird man to -- the car was stuck there so I got in the other car?

Voice: What other car?

A. The other car that was there.

Voice: There was a car there that you stole?

A. No, there was just a car there.

Voice: Where -- where this car was at?

A. Yeah, where that car stopped.

Q. How did they know a car?

A. That car was just there and we got in that car, so we went to Waterloo, Nipper will know where Waterloo is, we went to Waterloo and I stabbed Birdman to death with an ice pick.

Q. Alright, wait, you're losing me here. (not audible) this car that you got in, another words, you stole that car?

Voice: Or did ya'll have that car there?

A. The car was there, never mind the God Damned car----

Q. Well, we need to know----

Voice: I got to know what kind of car it was?

A. I don't remember it, alright there was a car there.

Q. So how did you get it started?

A. I put the key in the ignition, there was a car there and I started the car, I took Birdman out to Waterloo, Nipper will know where Waterloo is----

Q. Ok.

A. --I took Birdman out to Waterloo and it was the grosses God Damn soundin because he was my same age and he was just about my same age and I stabb him to death with that God Damn ice pick.

). While you was in the car?

. No, when we got to Waterloo.

). Now what -- tell me, I don't know about Waterloo, tell me about Waterloo.

. Ok, Waterloo's a big lake, everybody used to go skinny dipping there and the YMCA bought it and made it into a private camp, you know, but then again a couple years later they said, "Ok, everybody that wants to go swimming can go there", so everybody went there.

). So you got there and you both got out of the car?

. Right, we were talking and I had the ice pick in my back pocket and I knew I had to kill him cause he made me kill the other dude because he wrecked the car----

). Hu-huh.

. --(not audible) the dude decided to kill the other dude cause they couldn' leave him laying there, you know hurting and everything and so, let me light this cigarette -- and so -- ah, that burns -- might as well get used to a burn, I'm going to burn in hell, but anyhow I took him to Waterl I stabbed him there a whole bunch of times with an ice pick.

). Ok.

. I punchered his lung, I remember that cause I heard it go "shhh" and I got sick.

). Hu-huh.

. (not audible)but what I'd done, that I had to go ahead and do it, then I took him in an orange grove----

). Near Waterloo?

A. No, in the Highlands.

Q. Alright, then you put him back in the car?

A. Yeah, I put him in the trunk.

Q. In the trunk and drove to where?

A. The Highlands, possibly the Highlands, I forget where it drove to, but it was up in possibly the Highlands and he was buried in an orange grove, the

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orange grove had a long weeds in it, you know how it hadn't been tooken care of in quite a while.

Q. How did -- how did, I mean what did you use to dig up, was it a shallow grave that you dug?

A. It was pretty shallow, it was about (not audible)----

Q. - About a foot, foot and a half?

A. Yeah, and I bashed him in the head one time with the shovel and his head was caved in once with a shovel.

Q. Alright, how did or you had it with you, where did you get the shovel?

A. I just got it, I just stole it from someone, you know along the way. I've really got to piss, you know.

Q. Bashed in, you bashed him in the head?

A. I hit him in the head, yeah bashed him in the head with a shovel, the end of a shovel and then covered him up with dirt.

Q. Now did this -- this white male you told us about that you and Birdman killed or that you killed and Birdman was with you, did that hit the papers?

A. I don't know, I went to Lakeland.

Q. Well, do you know if they ever found Birdman?

A. I really don't know.

Q. Alright, well see that's why we got to really narrow that down as to where that's at cause----

A. Can I -- Can I -- alright, it was in an orange grove, -- can I take a piss?

Q. Alright, we are going to stop the tape while you go to the bathroom and then we'll start again.

Ok, now we are continuing and we want to talk about the exact location as to where you buried Birdman and you told us it was in the Highlands----

A. Possibly in the Highlands----

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Q. In the Highlands? In an old orange grove----

Voice: It wasn't taken care of-----

Q. How far out of Lakeland was this orange grove that----

A. Not very far, because Lakeland is pretty much (not audible) it would be a mile, mile and a half at the most, at the most.

Q. Hu-huh.

A. It could probably -- it would probably, you know it could be ah, thirty blocks as far as I remember (not audible)----

Q. Do you remember a road that it sits off of? Just a road or something like that?

A. Alright, a road or----

Q. What about a business or something like that, some kind of landmark there where it would be near. Were you on a paved road when you turned into it?

A. Right, right, we were -- yes, sure, for sure we were on a two laned paved road and when we turned off into the orange grove.

Q. Was it east of Lakeland or west of Lakeland, north, south or you don't remember?

A. I really don't know, I don't remember, but I can tell that ah, he had on a pair of brown boots when he was buried, one of the boots was off and so in the grave one of the boots was probably on or partially on, the other boot was thrown in the grave and he had on a pair of denim pants and the shirt I don't remember, the pants were denim, his wallet was removed ----

Q. Alright----

A. --and the dude had brown hair about as long as mine is (not audible) and he was just young kid.

Q. Ah, and you----

Voice: Was he from Lakeland area or do you know?

A. I met him in the Lakeland area----

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Voice: But you don't know if he was--

A. For sure I don't know if he was from the----

Q. If you was going to tell me how to get to this orange grove, I was a tourist in there----

A. (not audible)

Q. --and we were at the Lakeland Police Department say, which way would you tell me to go? Go out past this or that or what?

A. Alright -- (not audible) your Lakeland, let me say it's been long since I've in Lakeland, but I have my days pretty clean except for killing three dudes, but ah, you would go out past the -- go out past Highlands, that's a road, it's a road, my wife used to work at the 7-11 she got robbed out there once.

Voice: Out past Highlands?

A. Yes, Spook Hill, you go out past the Spook Hill probably.

Q. Ok, I know where that is.

Voice: About in that direction?

Q. I know where Spook Hill is, I've been there. This road----

A. Let me say this, I think so, I'm not really sure because I got really mixed up and all in all the driving that I was doing, but it's out there. I can tell you how he was buried.

Q. You could show somebody where he was buried though couldn't you?

A. No, I -- I seriously----

Q. You couldn't?

A. I cou -- I don't know.

Q. Then if you was taking back to the area, would it refresh your memory that----

A. Oh, if I was taking back, yeah, but ah,(not audible) area where he was buried, you could tell there was a grave there.

Q. Alright, let me ask you, this two lane paved road that you turned off

of to go into the grove, how far into the grove did you go?

A. Ah, about five to six hundred yards and then we turned on, you got your five hundred, six hundred yards.

Q. Alright.

A. Then we turned on to a spray truck rig, remember like----

Q. Right.

A. --when the groved it, down a little dirt road going between the grove----

Q. Ok.

A. --and we drove down -- I drove down approximately another maybe another two hundred and fifty yards to five hundred yards.

Q. When you got to this spray trunk road, you turned right or left?

A. Right -- ah, left, left.

Q. You turned left?

A. Left.

Q. And you stopped on the spray truck road?

A. About two hundred sixty yards----

Q. And it was right -- on the right hand side or left hand side of the spra truck?

A. Right hand side.

Q. Right there by the spray truck road?

A. About fifty yards.

Q. Ok.

A. He was buried between two trees.

Q. Were they orange trees?

A. Yeah, he had on a pair of brown boots, he had on one brown boot and

one brown boot was (not audible) on top of him.

Q. Now let me ask you this, what-- when you stabbed him at Waterloo, you put -- stabbed him and killed him, did you put him in the trunk of the car or in the seat of the car or where?

A. In the trunk.

Q. In the trunk.

A. He was also kicked several times and it was possible water in his lungs because I tried to drown him.

Q. Where at Waterloo?

A. Somewhere (not audible), he shoved un -- he was stabbed in the water with an ice pick.

Q. Ok.

A. And kicked.

Q. You dug the grave and buried him, then what did you do?

A. I left and I got drunk, and I got layed.

Q. Alright, well let me ask you this, you said here, going back you killed you and Birdman killed, or you killed this second subject that you killed a white male homosexual with the blonde hair, right?

A. Right.

Q. You -- and you said here you put, you stabbed with the -- in the chest with the ice pick and the car tool----

A. Tire tool and everything.

Q. --and you made Birdman watch, right?

A. Right.

Q. Then what -- then you left with Birdman?

A. We left we went tot he Union 76 Gas Station and got the gasoline, the Union 76 is by the Interstate.

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Q. That's what -- that what you -- I didn't understand cause you left that out when you was telling us about----

A. Oh, well, I said I wouldn't go there where I got gas, ok I----

Q. And then you went back and----

A. --poured the gas over him and burnt him.

Q. Alright, then you went back to the----

A. Scene of his murder,----

Q. Right---

A. --whatever.

Q. Ok.

A. And then we poured the gasoline over the car.

le Voice: Birdman help you?

A. I poured the gasoline in the car.

le Voice: Where was Birdman at this time just sitting----

(END OF TAPE)

Q. Continuing on side "B".

le Voice: One thing I want to ask you about is when -- when you ran off the road and got the flat tire and all of a sudden this other car appears, I don't -- I don't quite understand how you----

Q. How you got the keys, how -- how did you get the keys with it? Was the car just sitting there, ya'll stole the car or what?

A. (not audible) the car was there----

Q. Hu-huh.

A. --like I said the car was there.

Q. Well, after you killed Birdman and everything, you know, you buried Birdman, right?

A. Right.

Q. And then you got back in the car and you went and got laid, right?

A. Right.

Q. Well, what did you do with this car, did you ditch it somewhere?

A. It wasn't his car.

Q. But what did you do with it, did you ditch it? It wasn't your's either was it? So you said you left and went back into Lakeland, got drunk and laid, a little drunker and laid, but what did you do with the car, you had to do something with it unless it was yours.

A. The car just happened to be there, the car got ditched.

Q. And you ditched the car, remember what----

A. I left the car.

Q. You left it where, near the orange grove or in town?

A. No, I left it town somewhere.

Q. Would there be ah, would there be blood in the trunk of that car?

A. No.

Q. Well, you said you stabbed him several times.

A. Yeah, but there was a blanket wrapped around him before I put him in the trunk.

Q. Where about, in the grave was there-----

A. Blood, there should -- yes, it was a blanket.

Q. Ok----

A. There was a blanket----

Q. You didn't see any blood in the trunk of that car though?

A. No, I checked pretty good, there wasn't no blood.

Q. You wiped that car down for prints and all or did you think about it.

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A. (not audible) yeah, I wiped it down for prints and everything.

Q. And the best that you can remember how long ago was this, about this about this white male homosexual and Birdman? How long after the first murder, after you -- after you----

A.

A. Well, after the first mur-- this Birdman and the queer happened this year, within the last three or four months (not audible)

Q. Ok, and it happened when you were seperated from your wife----

A. From my wife.

Q. You and her----

A. Right.

Q. --got into a little conflict----

A. Right.

Q. --and you hauled buggy back to Lakeland.

A. Right.

Q. Remember whether it was Friday night or Saturday night or----

A. It was -- I'm not really sure, it might have been -- ah, I'm not really sure, I can't even say what night it was (not audible), but it wasn't a Monday, I know that, you know.

Q. Alright, I have a question for you. Why are you telling us this?

A. Because I'm fucking tired of waking up in the middle of the night thinkin, about it.

Q. It's been buggin you, huh?

A. Yeah, I think that either I tried -- either I tell you people this, you know, I figure if I come here and tell you people this and the most that will happen, -- alright, I figure if I come here and tell you people this that (not audible) maybe I'll spend two or three days in the drunk tank--

Q. Hu-huh.

A. --and it will relieve my God Damn conscious----

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Q. Hu-huh.

A. --if not----

Q. Ok, then your wide awake and you know what your doing----

A. Yeah, I'm wide awake, yeah, I'm wide awake, I talked to my wife.

Q. You know what your saying?

A. Yeah, I talked to my wife before we come down here, I explained it to her before we went to the 7-11 and called, I explained why that I wanted to call the police and talk to them, is because I want, you know.

Q. To get it off your chest, to get it off your mind.

A. Yeah, I mean, whatever, you know and I'm a real ass, I figure I'm (not audible) grade "a" assholes and so I might as well do whatever real greater assholes do.

Q. Let me ask you this, Wesley, have you been in any other trouble other than these murders or anything since you got out of the boys home and being arrested in our city at the Function Junction for a little fight, have you been in any other trouble of any kind any where----

A. No.

Q. --since you got of Okeechobee, you've been arrested one time, is that right and that was here in Daytona Beach?

A. I've got several parking tickets----

Q. We're talking about where you were locked up----

A. No.

Q. Just the one time and that was here in Daytona Beach?

A. Right.

Q. --as a result of a fight?

A. Yeah, and I lost, more or less.

Q. Had -- now when commited these things that are before -- you -- when you left Lakeland you came to Daytona, right?

A. No, when I left Lakeland I went to Gainesville, that's where I met my wife.

Q. Yeah.

A. I lived with her for a while in Melrose, in the city of Melrose (not audible).

Q. Yeah, I know where that is.

A. Yeah, ok, we got married in Gainesville-----

Q. Hu-huh.

A. --and then we moved here to Daytona.

Q. How long did you move to Daytona now, do you remember?

A. About two years ago, I committed the first murder before I married my wife, when I killed "Mack".

Q. Hu-huh.

A. And I met my wife and----

e Voice: Did you tell your wife about the murder, the first one at all before the night, I mean it doesn't make any difference, you know----

A. Then, I'm not going to say.

Q. Ok, (not audible), well, I was just curious for my benefit, that's all---

A. Well, then I'll, you know, I'm not (not audible)

Q. (not audible) is irrevelant, what your tell us was important.

A. Yeah.

Q. Ah, can you remember anything that you might have left out.

A. Alright, (not audible) the significant parts that I can remember is the last three killings have happend in the same night, this is the best I can remember, alright, the dude was killed -- the first one was killed where he was put in his car and burned, there was a house close by about hundred and fifty yards away and it was on a hairpin curve, like, you know a hairpin or a short curve, everything curved, he was burned, there was tire tracks leading, it went around the lake, now before it got to

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the curve where he was burnt, went around the lake, the tire tracks, the blown out tire was around the neighborhood of Hennessee Avenue, Hennessee -- around there, there was a small store, sort of like a 7-11, but it was half-assed abandoned, you know half-assed run that's where we pulled into -- I pulled into the parking lot, the tire had gone out down the street from there, I pulled into the parking lot there, we realized the tire -- you know, I realized the tire was gone see man, (not audible) by the seat of your pants so we backed out of there and drove it back and there should have been tire marks from you know, like rim marks----

Q. Hu-huh.

A. --from that 7-11 on back.

Q. Ok, ah, if you don't have anything else we'll conclude the interview for right now and again for the tape, I want to ----

A. Inform me of my rights.

Q. No, to re -- well, more or less, re-emphasize, then have you confirm that this statement that your giving is own your own ----

A. (not audible)

Q. --it's on your own accord----

A. -- I want a cell by myself----

Q. And your not----

A. --ok.

Q. And your not under any pressure to make this-- this statement.

A. No, they're not twisting my arm or beating me in my head----

Q. Alright.

A. --I'm just saying it cause I want to.

Q. Ok, end of interview, the time is 2:10 a.m., 9/6/75, Det. J. H. Jenkins.

sf

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Item #4	SUPPLEMENTARY REPORT MONROE BRANNEN, SHERIFF POLK COUNTY, BARTOW, FLORIDA	CC# 204506 P4 36207 36211 37618

The date is September the 8th, 1975, the time is now 10:12 A.M.. The location is the Lakeland Sub-Station of the Polk County Sheriff's Department. Present is Lt. Chuck Keeney, Polk County Sheriff's Department. I am present with and I am going to interview MRS. PATRICIA JOHNSON, the wife of Wesley Irving Johnson. Mr. Wesley Johnson is in custody in the Polk County Jail at this time charged with three counts of murder. This will be in reference to CC#'s 205406, it's a homicide investigation into the death of Caleb McDowell, offense occurred on August the 3rd, 1973, CC# 36207 and 36211 in reference a homicide investigation of one John Mitchell Arnsdorff on July 29th, 1975 and CC# 37618, title "Missing Person", one James Wagner, who is now a subject of a homicide investigation. Mrs. Johnson came forward this date, voluntarily to give a recorded statement concerning information he or she has during -- received during conversations with her husband, Wesley Johnson.

Q. Mrs. Johnson, would you state for the record your full name and date of birth, please? Speak up.

A. Patricia Johnson, August 24th, 1944.

Q. Would you speak up a little bit now, your voice is kind of soft here an I want to make sure they hear you.

A. Patricia Johnson, August 24th, 1944.

Q. Where do you live, Mrs. Johnson?

A. 314 University Blvd. in Daytona Beach.

Q. You live there with Mr. Johnson----

A. Yes----

Q. --up until two or three days ago?

A. Yes.

Q. Alright, on the morning of the 6th of September, this past Saturday, yo husband, Wesley Johnson made a phone call to the Daytona Police Departm and did advise them that he wanted to talk to them about three murders committed in Polk County, is that right?

A. That's right.

Q. Speak up ma'am, we can't hear you.

Sheriff's Form No. 41A

Investigating Officers:	Date

Classification	SHERIFF'S OFFICE SUPPLEMENTARY REPORT MONROE BRANNEN, SHERIFF POLK COUNTY, BARTOW, FLORIDA	Complaint No.

A. That's right.

Q. At any time prior to him making this phone call, did he discuss this with you?

A. Yes.

Q. Alright, would you now at best you can remember, tell me in some -- try to get some order to it as to the death of the, of Mr. McDowell in the trunk of his of '73 and then the deaths of Arnsdorff and Wager recently, would you talk about that for me, please?

A. The first one, in '73 he just told me that he had killed somebody, he'd never talked about it unless he was drunk and he said he was a queer and he shot him and put him in this car and burned him up in the trunk.

Q. Did he say that this was a black man?

A. Yes.

Q. It was -- he did say----

A. He said it was a nigger.

Q. A nigger? Alright, that's all he ever discussed about that?

A. Yes.

Q. How long have you been married to Mr. Johnson?

A. A little over a year.

Q. How long after you were married to him did he discuss this with you?

A. He told me about it before we were married.

Q. Did you live together before you were married?

A. Yes, for six months.

Q. Six months?

A. Yes.

Q. Was it during that period he told you about it?

A. Yes.

Investigating Officers:	Date

Classification	SHERIFF'S OFFICE SUPPLEMENTARY REPORT MONROE BRANNEN, SHERIFF POLK COUNTY, BARTOW, FLORIDA	Complaint No.

Q. Alright, now that's all he told you about the -- the black man in the trunk of the car?

A. Yes.

Q. Now there's two other, ah, one other homicide for sure, Mr. Arnsdorff's where he was burned in the trunk of his car in July. Did he talk to you about that?

A. Yes, he just told me that he and Dennis did it and they burned him up in the car too.

Q. Did he mention Dennis's last name?

A. No, but-----

Q. Did he call him any other name?

A. His name was -- his nickname was "Lurch".

Q. And he did tell you that "Lurch" and he himself did murder Mr. Arnsdorff

A. Yes.

Q. Did he go into any detail of the murder to you that you can recall?

A. He said he robbed him in his apartment where he was staying here.

Q. Now this is Arnsdorff's apartment?

A. I don't know, in the apartment that my husband was staying in.

Q. He robbed him there?

A. Yes, and they carried him out and put him in the trunk of the car and they took him out and they killed them and they burned him up.

Q. Did he say how he killed him?

A. He stabbed him with a tire iron.

Q. He did stab him with a tire iron?

A. Yes.

Q. Alright, now there's another party involved, a Mr. James Wagner, did he tell you anything about that?

Investigating Officers:	Date

A. He told me that he was with him and he helped.

Q. He helped him kill Arnsdorff?

A. Yes.

Q. Alright, then what happened to Mr. Wagner after that?

A. I don't know.

Q. He didn't mention anything about Mr. Wagner?

A. No.

Q. Did he mention thing about burying a body in a grove?

A. No.

Q. His statement to us that was after they killed Arnsdorff they also stabbed Wagner with an ice pick, put him a trunk of the car they were driving and took him to a grove. He didn't discuss this with you?

A. Yes, she did, he said, he ah, -- he -- he said he stabbed him with the knife pick, this is what he told me when we were walking down to the with the police and they buried him.

Q. Did he say, like did he generalize this to where he buried him?

A. No.

Q. What do you think made your husband decide to turn himself in?

A. He was having bad dreams about it, he told me he didn't know if he real did it or if it was a dream and it was bothering him so he called the police to have them check on it, he says "If it didn't happen , I'll jus be arrested for wasting their time and being drunk and they'll let me go", he said he really didn't know if he did it.

Q. What was his reasons for not know whether he did it?

A. I don't know.

Q. Was he drunk? Did he say he was drunk at the time this all happened?

A. Yeah, he was drunk.

Q. Did he ever mention whose car they were in on the night, whose car they were driving?

Classification	SHERIFF'S OFFICE SUPPLEMENTARY REPORT MONROE BRANNEN, SHERIFF POLK COUNTY, BARTOW, FLORIDA	Complaint No.

A. Dennis's.

Q. Did he describe the car to you?

A. No.

Q. Did he ever mention any kind of a particular kind of car? Did they say how they transported Wagner's body?

A. Who was Wagner?

Q. Well, the one he stabbed with the ice pick. Speak up, will you, please

A. No, he never he said anything about that.

Q. You know after they stabbed him and they took him out to bury him, did they say how they carried him out there?

A. No.

Q. The most details he told you was in reference to the Arnsdorff murder, right? The one where they burned in the trunk?

A. Yes.

Q. I know your -- these names are kind of confusing to you, but the first one, the black man was McDowell, the second one was a white man named, Arnsdorff who both of them were burned in the trunk and Wagner is one we have not found yet, whose supposed to be buried some place, but -- but he did mention that fact that Wagner was with him and Dennis at the time they did kill Arnsdorff?

A. Yes.

Q. Did he ever mention the name "Bird", "Birdman" or something like that?

A. Yes.

Q. Who was he referring to then?

A. I don't know, he just said that "Birdman" was with them, ----

Q. "Birdman" is the one they stabbed? That's Wagner.

A. Ok.

Q. That is that make it clear to you?

Investigating Officers:	Date

Classification	SHERIFF'S OFFICE SUPPLEMENTARY REPORT MONROE BRANNEN, SHERIFF POLK COUNTY, BARTOW, FLORIDA	Complaint No.

A. Yes.

Q. Can you speak up a little bit?

A. Yes.

Q. Alright, is there anything else that you might add to this that would might be helpful in this investigation?

A. I don't know anything else about it.

Q. And this statement, you've given me now, is free and voluntary?

A. Yes.

Q. And you came here of your own free will?

A. Yes, I did.

Q. I haven't promised you anything or threated you in anyway to get you to make this statement?

A. No, you haven't.

Q. And you realize this man's wife and you are not required to testify against him?

A. Yes.

Q. And this -- this is -- your doing this voluntarily to bring the truth, right?

A. Yes.

Q. Is this statement the truth to the best of your knowledge?

A. Yes, it is.

Q. This statement concludes at 10:19 A.M..

sf

Investigating Officers:	Date

Classification

SHERIFF'S OFFICE
SUPPLEMENTARY REPORT
MONROE BRANNEN, SHERIFF
POLK COUNTY, BARTOW, FLORIDA

P5

CC# 36211
C/R# 204506
C/R# 37618

Polk County Sheriff's Department, Lakeland Sub-Station. Phone conversation between Lt. Chuck Keeney, Polk County Sheriff's Department and Patricia Johnson, wife of Wesley Irvin Johnson.

Johnson: ----already caught Dennis on August 8th and you had been lookin for him on -- I mean on August 6th.

Keeney: Right.

Johnson: And you had already been looking for him.

Keeney: Right.

Johnson: To (not audible) you all's talk with Lurch, that his name kept coming up.

Keeney: Right.

Johnson: Irvin didn't know that, that's why he never said nothing about nobody.

Keeney: Well, see that's why I told him yesterday that, you know we -- we purposely didn't mention anything to him waiting for him to tell us the whole truth----

Johnson: He said----

Keeney: --but he would tell us up to a point, but he never told us who h was with and he never told us what car he used and we knew see, he -- we knew he was holding back something and then when I put on him yesterday, I think that got him to thinking, you know.

Johnson: Yeah, he told me last night on the phone, when I told him abou that piece, what was in the Daytona paper, I've got it with me, he says if I -- if ya'll let me see him for ten minutes----

Keeney: Alright.

Johnson: --that he can read that piece of paper, he'll tell you anything everything signed, any papers you want and he'll -- he's willin to take a lie detector test to prove that he didn't kill them people himself.

Keeney: But he was there?

Johnson: Yeah, he was there and he watched them.

Sheriff's Form No. 414

Investigating Officers: | Date

Keeney: Alright, well that's----

Johnson: And he'll tell you that too.

Keeney: Alright, well that's all want to know and I'll let you see him for more than ten minutes, if you'll get him to tell me the truth.

Johnson: He will.

Keeney: I want the truth, I don't want know fabricated stories.

Johnson: He won't, he's never told me the truth and I talked to him last, but I don't know about ya'll jails down here, but in Daytona they sit and listen on the phone.

Keeney: Well, we don't, well, we can listen on the phone, but we don't -- we respect the man's privacy, we don't do that.

Johnson: Yeah, well----

Keeney: Well, when your talking to him reading his things, there is going to be somebody there with you.

Johnson: Yeah.

Keeney: Well, we can't let you be in a room by yourself.

Johnson: Well, I understand that, but he just wants to see that paper and see me for ten minutes and he said to tell you that and I have---

Keeney: Do you have a way to get to Bartow?

Johnson: Yeah, his brother going to in from Plant City in a few minutes.

Keeney: Well, I'll tell you what I'll do, ah, if you'll me whenever his brother gets in there I'll make arrangements to meet you in Bartow Norm Reed and I and we'll sit down and talk this thing over.

Johnson: Ok.

Keeney: Ok, now he -- he must realize he has an attorney who is -- has tol him not to talk to me, but he-----

Johnson: He asked me, he told me, he says, if you'll let him see me, and let him read that paper that he won't even need an attorney.

Keeney: Very good, alright that's -- that's the best news, all he's got t do is tell us the truth and I think he'll feel a lot better and whatever the out come is the fact that he works with us on this going to help him in some way.

Johnson: Yes, I know he can go to prison for being an accessory to murde and everything else.

Keeney: Well, to be honest with you, we didn't believe his story, his wh story from the beginning, you know, we knew he was covering up f somebody.

Johnson: Well, yeah, he just wants to read for himself that Lurch had al told on him and then he's -- he's going to tell you everything all.

Keeney: Alright, well I'll -- you call me as soon as your brother or wh ever is coming there gets -- gets there.

Johnson: Yeah, they just called from Plant City.

Keeney: Alright, we'll make arrangements to meet you in Bartow.

Johnson: Ok.

Keeney: Ok.

Johnson: Thank you.

Keeney: Thank you ma'am.

sf

Portion of Closing Argument, March 25, 1976

Assistant State Attorney Monterey Campbell:

MR. CAMPBELL: They drive out to Waterloo and while they are sitting there talking about what is going to be done with the $6 -- $6. Remember? What did he tell Mrs. Johnson they had taken? $6 off of the guy. When they are trying to decide what they're going to do with the $6 and the watch and they get into an argument about the watch. Then Lurch starts getting nervous about the icepick, and he's walking up and down, and he says to Johnson, "Grab him." And I asked him, "How do you know who he was

SYDNEY C. NEIL
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BARTOW, FLORIDA 33830

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(3)

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1984

Case No. 84-1047

LOUIE L. WAINWRIGHT, Secretary
Department of Corrections
State of Florida

Petitioner,

vs.

DENNIS WAYNE SMITH

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER ON JURISDICTION

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18 pp

QUESTIONS PRESENTED

1. Whether counsel's representation fell below the performance standard required by this Court in Strickland v. Washington, ___U.S.___, 80 L.Ed.2d 674 (1984), where counsel's cross-examination, although adequate, did not include all sources of impeachment evidence.

2. Assuming counsel's performance was deficient, does prejudice result from the failure to use a pretrial statement for purposes of impeachment where the record as a whole demonstrates that counsel effectively attacked the witnesses' credibility using other sources of impeachment evidence.

3. Whether the Court of Appeals failed to properly apply, pursuant to 28 U.S.C. §2254(d), the factual findings made by the state trial court after a full and fair hearing regarding an alleged

violation of Brady v. Maryland, 373 U.S. 83 (1963).

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REASONS FOR GRANTING THE WRIT

1. WHETHER COUNSEL'S REPRESENTATION FELL BELOW THE PERFORMANCE STANDARD REQUIRED BY THIS COURT IN STRICKLAND V. WASHINGTON, ___U.S.___, 80 L.Ed.2d 674 (1984), WHERE COUNSEL'S CROSS-EXAMINATION, ALTHOUGH ADEQUATE, DID NOT INCLUDE ALL SOURCES OF IMPEACHMENT EVIDENCE.

Respondent has restated the first issue of the petition as follows:

> Where no "reasonable trial strategy" appears from the face of the record to explain trial counsel's failure to use prior inconsistent statements in impeaching the testimony of the State's critical witnesses, the Circuit Court of Appeals' remand for an evidentiary hearing on the issue does not create conflict with the standards for judging an ineffectiveness of counsel claim enunciated in Strickland v. Washington, ___ U.S.___, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Respondent's claim that Smith waived his right to closing argument by "putting on testimony from witness Parks" is in

error. Respondent's Brief on Jurisdiction at 7. Smith testified in his own defense at trial. He was the only witness for the defense and, therefore, did not give up his right to open and close final argument. Smith v. State, 365 So.2d 704, 706 (Fla. 1978).

Respondent's argument that the September 6th statements would have "planted doubt in the minds of the jurors"[1] erroneously assumes that the inconsistency between the two statements was sufficient to cast doubt on Johnson's credibility. On the contrary, the statement of September 6th and the testimony given by Johnson at trial was not so inconsistent as to render Johnson's trial testimony unbelievable. Although Johnsons's earlier statement made no

---

1 Respondent's Brief on Jurisdiction at 7.

reference to Smith, the statement did indicate that a second automobile was present at the scene of the murder. Johnson refused to answer any questions regarding the source of this vehicle or its driver. In subsequent statements made to police Johnson identified Smith as the driver of the second automobile. Thus, contrary to respondent's claim, the September 6th statement was not so inconsistent as to have destroyed Johnson's credibility as a witness.

Finally, respondent submits that review of this issue is not "ripe" because the Court of Appeals did not rule that counsel was ineffective, but simply remanded for an evidentiary hearing to determine whether failure to use the statements for impeachment was prompted by reasonable trial strategy. Respondent's Brief on Jurisdiction at 8. Where

counsel's trial strategy is apparent from the record, an evidentiary hearing is not required. Under the circumstances of this case, an evidentiary hearing on the issue of counsel's trial strategy is directly contrary to the principles announced by this Court in Strickland.

In Strickland, the District Court held an evidentiary hearing to inquire into trial counsel's efforts to investigate and to present mitigating circumstances. This Court reasoned that the state courts properly concluded that the ineffectiveness claim was meritless without holding an evidentiary hearing. 80 L.Ed.2d at 702. As in Strickland, the ineffectiveness claim in this case is capable of resolution based on the record before the district court. No evidentiary hearing is necessary.

This Court held in Strickland that a

court must indulge a strong presumption that the challenged conduct constitutes reasonable trial strategy. 80 L.Ed.2d at 694-695. The record in this case is clear that counsel's strategy during trial was to attack Johnson's credibility primarily on the basis of his plea bargain with the state. Counsel made this point during his cross-examination, together with the fact that Johnson had taken sole responsibility for the crime on another occasion.[2] Simply because other lawyers might have proceeded differently is not enough to render the assistance ineffective. Respondent has failed to rebut the Strickland presumption that counsel's actions were reasonable trial strategy.

---

2 While in jail awaiting trial, Johnson wrote a note to Smith which states that "I made sure he heard me talking about how I done it by myself..." This note indicates that Johnson confessed to another inmate Parks so that Smith could call Parks at trial to impeach Johnson.

2. ASSUMING COUNSEL'S PERFORMANCE WAS DEFICIENT, DOES PREJUDICE RESULT FROM THE FAILURE TO USE A PRETRIAL STATEMENT FOR PURPOSES OF IMPEACHMENT WHERE THE RECORD AS A WHOLE DEMONSTRATES THAT COUNSEL EFFECTIVELY ATTACKED THE WITNESSES' CREDIBILITY USING OTHER SOURCES OF IMPEACHMENT EVIDENCE.

Respondent has restated the second issue of the petition as follows:

> Assuming trial counsel's performance is in fact deficient, the Strickland "prejudice" standard is met by a showing that the evidence which counsel failed to use consisted of the earliest record statements to the police by the crucial witnesses against respondent, in which the witnesses failed to make any mention whatsoever of respondent's participation in the offense.

Respondent's claim that the Johnsons initial statements to police would have "carried substantial weight with a jury of laymen" misses the mark. The question, as

posed by this Court in Strickland is whether the attorney error undermines confidence in the outcome or renders the results of the proceeding unreliable.

In making the determination whether the specified error or omission resulted in the required prejudice, a court must consider the "totality of the evidence" before the judge or jury. Strickland at 698. As noted by this Court, some factual findings will be unaffected by the error and others will not. The purpose of the prejudice inquiry is to determine whether "the decision reached would reasonably likely have been different absent the errors." Id at 699.

In addition to the direct evidence of guilt provided by Johnson's testimony there was considerable circumstantial evidence against Smith. It included testimony of observers at the second bar,

which fit Johnson's story of what happened there better than Smith's. Further, Smith was linked to the scene of the crime by expert opinion that tire tracks found there were unquestionably from his car. The same expert testified that tennis shoes found at the scene could have been made by Smith's tennis shoes. Smith v. State, supra at 706.

Trial counsel effectively challenged the credibility of Patricia and Wesley Johnson through competent impeachment evidence. Failure to use the September 6th statements as further evidence of impeachment did not render the results of the trial unreliable. Given the totality of the evidence presented to the jury, the decision reached would not in all likelihood have been different absent the omission.

3. WHETHER THE COURT OF APPEALS FAILED TO PROPERLY APPLY, PURSUANT TO 28 U.S.C. §2254(d), THE FACTUAL FINDINGS MADE BY THE STATE TRIAL COURT AFTER A FULL AND FAIR HEARING REGARDING AN ALLEGED VIOLATION OF BRADY V. MARYLAND, 373 U.S. 83 (1963).

Respondent has restated the third and final issue of the petition as follows:

> In shaping a pragmatic remedy to avoid a patent injustice to respondent if a certain unique factual finding should be made by the district court on remand for evidentiary hearing, the Circuit Court of Appeals does not fail to give proper weight to the "presumption of correctness" normally given to a state court hearing.

By permitting the District Court to reopen the Brady issue, the Court of Appeals has effectively circumvented the policy underlying 28 U.S.C. §2254(d) and Sumner v. Mata, 449 U.S. 539 (1981).

In a series of cases this Court has

recognized the valid interests in promoting policies which insure that at some point in time there will be an end to litigation and that federal appellate court fact-finding is not superior to that of the state courts. Sumner v. Mata, supra at 550 fn. 3; Smith v. Phillips, 455 U.S. 209 (1982); Marshall v. Lomberger, 451 U.S. 422 (1982); Maggio v. Fulford, ___U.S.___, 76 L.Ed.2d 794 (1983); Wainwright v. Goode, ___U.S.___, 78 L.Ed.2d 187 (1983); Patton v. Yount, __ U.S.___, 81 L.Ed.2d 847 (1984). The approach adopted by the Court of Appeals expands the number of unnecessary evidentiary hearings in the Federal District Court and further exacerbates the tension between state and federal judicial systems.

Because the decision of the Court of Appeals constitutes a departure from

Sumner v. Mata and §2254(d), the petition should be granted and summary reversal is appropriate.

CONCLUSION

For the reasons set forth in this brief as well as the initial brief, petitioner respectfully urges this Court to grant Certiorari and reverse the decision of the Court of Appeals in and for the Eleventh Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Theda James Davis, Counsel for Petitioner, and a member of the Bar of the United States, hereby certify that on the 27th day of February, 1985, I served three copies of the Reply Brief of Petitioner by U.S. Regular Mail to Sandra Goldenfarb, Esq., 631 Chestnut Street, Clearwater, FL 33516-5379 and Patrick D. Doherty, Esq., 619 Turner Street, Clearwater, FL 33516.

Theda James Davis
OF COUNSEL FOR PETITIONER